IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-990

UNITED STATES OF AMERICA,
Petitioner,

v.

CLIFFORD BAILEY ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES T. COGDELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

CASES:

Page

Page

Page

Page

Page

Page

STATUTES*:

---

* Unless otherwise indicated, U.S. code citations throughout this brief are to the 1976 edition.

Page

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in the principal case, *United States* v. *Bailey et al.*, appears in the appendix to the petition (Pet. App. 1a-91a) and is reported at 585 F.2d 1087; the opinion of the court of appeals in the companion case, *United States* v. *Cogdell* (Pet. App. 100a-113a), is reported at 585 F.2d 1130.

QUESTIONS PRESENTED

The questions in this case all relate to the proper construction and application of the principal provision of the federal escape laws, 18 U.S.C. § 751(a). The questions are:

(1) Whether failure to return to custody acts as an absolute bar to the defense of duress or necessity in an escape prosecution, or whether failure to return to custody is merely a relevant factor for the jury to consider in assessing that defense.

(2) Whether a conviction for escape may be sustained, after the trial judge refused instructions on the defense of duress or necessity, on a theory that defendants were nevertheless guilty on a theory of escape as a continuing offense, when that theory was reflected neither in the indictment nor the instructions.

(3) Whether escape is a "continuing offense" that may be committed by the act or omission of failing to

return or to report to custody after an unauthorized departure from custody.

(4) Whether instructions on the defense of duress or necessity were properly denied in these particular prosecutions for escape, because defendants failed to put on or proffer adequate evidence of threats and other intolerable conditions of confinement.

(5) Whether a prisoner who leaves custody without authorization in order to avoid threats and conditions of confinement that threaten his personal safety lacks the requisite state of mind to support a conviction for escape.

STATUTE INVOLVED

18 U.S.C. § 751(a), the principal provision of the federal escape laws in Chapter 35 of Title 18, provides:

> "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for

extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both." Act of June 25, 1948, c. 645, § 1, 62 Stat. 734; as amended, Act of Dec. 30, 1963, Pub. L. 88-251, § 1, 77 Stat. 834; Act of Sept. 10, 1965, Pub. L. 89-176, § 3, 79 Stat. 675; Act of Oct. 17, 1968, Pub. L. 90-578, § 301(a)(3), 82 Stat. 1115.

STATEMENT OF THE CASE

A. Introduction

Respondents Clifford Bailey, Ronald Cooley, Ralph Walker,[1] and James T. Cogdell were convicted of escape in violation of 18 U.S.C. § 751(a), after a jury trial (for Bailey, Cooley, and Walker) on March 8, 9, 10, 11, and 14, 1977, and a jury trial (for Cogdell) on May 9 and 10, 1977.[2] Each was sentenced to five

[1] The name of this defendant, by the time of trial, was Ralph Walker-El, and the transcript occasionally reflects the name change. Since he was indicted as Ralph Walker and is referred to most often in the transcript by that name (and throughout the Government's brief), we have used the shorter form of his name to avoid confusion.

[2] Bailey and Walker were serving federal sentences at Leavenworth, Kansas, and had been transferred to the D.C. Jail pursuant to writs of habeas corpus ad testificandum issued by the Superior Court of the District of Columbia. Cooley had been committed to the custody of the Attorney General on May 20, 1976, following his conviction in the U.S. District Court for the

years' imprisonment, to be served consecutively to sentences previously imposed, subject to the immediate parole eligibility provisions of 18 U.S.C. § 4205(b)(2).

All four respondents had escaped, to use the term colloquially, from the New Detention Center of the District of Columbia Jail during the early morning hours of August 26, 1976. Although the Government never attempted to prove that respondents escaped together, they were jointly indicted on November 23, 1976, each for escape in violation of 18 U.S.C. § 751(a) and for escape in violation of 22 D.C. Code § 2601 (1973) (App. 9). Apart from differing language attributable to the nature of Cogdell's custody, not germane here, the language of the counts was identical for each respondent.[3]

District of Columbia for possession of an unregistered firearm and was still awaiting transfer out of the D.C. Jail. Cogdell had been transferred to the District of Columbia Jail from the Fairfax County Jail in Virginia pursuant to a writ of habeas corpus ad prosequendum.

[3] "[First, Second, and Fourth Counts:]

"*On or about August 26, 1976,* within the District of Columbia, [respondent Bailey/Cooley/Walker], having been lawfully committed to the custody of the Attorney General * * * *did unlawfully and wilfully flee and escape from such custody.*

"[Third Count:]

"*On or about August 26, 1976,* within the District of Columbia, [respondent Cogdell], * * * having been in the [*sic*] custody under and by virtue of a commitment issued

On the day set for trial, March 8, 1977, Cogdell's counsel was unable to appear, and Cogdell's case was severed from that of the other three. Trial proceeded against respondents Bailey, Cooley, and Walker.

B. RESPONDENTS BAILEY, COOLEY, AND WALKER

1. The Government's Case-in-Chief

The Government's case-in-chief was exceedingly brief. Documentary evidence was introduced to prove that respondents were in the custody of the Attorney

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under the laws of the United States by a Judge of the Superior Court of the District of Columbia * * *, *did unlawfully and wilfully flee and escape from such custody.*

(Violation of Title 18, U.S. Code, Section 751(a))

"[Fifth through Eighth Counts:]

"*On or about August 26, 1976,* within the District of Columbia, [each respondent] having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C. Code, Section 2601)" (Emphasis added.)

Significantly, the counts under § 751(a) charged the respondents with "wilfully" fleeing and escaping, while the counts under § 2601 charged them simply with escaping. The four counts charging violation of the local statute have dropped out of the case. The jury was instructed not to consider the local charge if it found any respondent guilty under the federal escape statute. (See App. 224; Tr. 804.)

General at the time of the escapes. Calling no eyewitnesses to the escape, the Government introduced an "Escape and Apprehension Report" for each respondent, prepared when the escapes were discovered (Government Exhibits 4-A, 5-A, 6-A). Each of these, filed on August 26, 1976, reflected a time of escape for the respondent of 5:35 a.m. (see App. 22; Tr. 24-25), and each contained a statement that read:

> "Subject went into a cell that has access to the outside, and escaped through a low level window, which had a bar removed by cutting under frame. Subject lowered himself by use of a rope fashioned from a bed sheet."

An employee of the D.C. Department of Corrections testified in addition that the files of the respondents did not reflect permission to leave the New Detention Facility, as the files would have, had such permission been granted (App. 23-24; Tr. 27-28). Finally, an FBI agent testified that respondents had been apprehended in the District of Columbia on November 19 (Bailey), September 27 (Cooley), and December 13, 1976 (Walker) (App. 27-28; Tr. 65-66).

2. The Defense Evidence

In the defendants' case, it was brought out that all three defendants had been confined in that section of the New Detention Center of the D.C. Jail known as "Northeast One" (the northeast section of the first floor), a maximum security section for the confinement "of people on protected custody, incorrigibles

and escapees." (See App. 39; Tr. 158, 197.) It was a "dead lock" section of the jail, where inmates were confined in individual cells and not permitted out except for showers, medical treatment, or other special trips, on all of which they are escorted by correctional officers and kept in handcuffs and leg irons (App. 39-41, 160-61; Tr. 158-161, 541-43). Certain of the cells had no windows (App. 97; Tr. 372). Respondents did not dispute that they had left the jail without permission. They presented the defense of duress or necessity, based in whole or in part on the conditions in that section. The conditions and occurrences which allegedly forced them to escape included smoke inhalation from repeated fires set in the section, threats and assaults by correctional officers, and, for Walker in particular, failure to treat him adequately for his susceptibility to epileptic seizures. In addition to the three respondents, ten witnesses testified for the defense, though testimony about the conditions of confinement in Northeast One and related occurrences came primarily from the respondents and four fellow inmates.[4] We have summarized below the principal features of the defense evidence.[5]

[4] Bernard Wilson, Oliver Boling, Garland Hines, and Thomas Robinson.

[5] Since the defense was not permitted to go to the jury and, accordingly, only the evidence favorable to that defense is relevant, we have not attempted, like the Government and the dissenting opinion below, to summarize the testimony unfavorable to the defense. It was for the jury to assess the credibility of the witnesses for the defense and draw reasonable inferences from that testimony.

(a) Evidence of fires and smoke. There was testimony that during the period that respondents were confined in Northeast One fires were regularly set in the section, "every day" (App. 34, 35, 100; Tr. 150, 152, 377); "almost every day" (App. 107; Tr. 390); or "at least two every week" (App. 87; Tr. 353-54). Respondent Bailey testified that the side of his face was burned in one such fire (App. 163; Tr. 546), but the more common difficulty was smoke inhalation endangering inmates' lives and making them sick (App. 45, 124-25; Tr. 168, 415). Several witnesses testified that the fires lasted as long as an hour (App. 96, 100, 102, 164; Tr. 372, 377, 381, 547), an hour and a half (App. 108; Tr. 390), or even 24 hours (App. 124; Tr. 415). Or the smoke itself would last all night (App. 108; Tr. 390), because of the closed windows (App. 34; Tr. 151) and inoperative air conditioning (App. 42, 164; Tr. 163, 547). Inmate Bernard Wilson testified that inmates had to break windows in the units to get air because of the smoke (App. 34-35, 42; Tr. 151, 163); Oliver Boling, who had no window in his cell, testified that he had to "get on my knees and stick my head in the toilet in order to breathe * * *" (App. 100; Tr.378). Although most of the fires were set by inmates, there was testimony that they were at times set by correctional officers (App. 96, 100, 102; Tr. 371, 378, 381) and that one particular officer would set fires with trash bags and return to feed the fire (App. 102; Tr. 381-82). In any event, there was additional testimony that the correctional officers often let the fires burn (App. 41-42; Tr. 162).

Witnesses testified that they had complained frequently about the fires and smoke (App. 35, 49; Tr. 152, 180), and it is undisputed that correctional officials were aware of a problem with fires in Northeast One (App. 56-57, 209; Tr. 206-08, 749).

(b) Evidence of threats and assaults. There was considerable testimony about beatings administered by correctional officers in Northeast One. They occurred "more or less like an every day thing," according to inmate Bernard Wilson (App. 37; Tr. 155), who testified that correctional officers tried to beat him "half to death" sometime in August 1976 (App. 35-36, 44; Tr. 152-54, 165).[6]

(i) Respondent Bailey. Extensive testimony related to threats and assaults on respondent Bailey. Bailey had been brought to the District of Columbia on or about June 5, 1976, pursuant to a writ of habeas corpus ad testificandum for the purpose of testifying in the case of *United States* v. *Brad King*, in D.C. Superior Court (App. 21; Tr. 12). The writ indicated that Bailey was expected to give testimony on June 14, 1976 (*id.*). Although there was no evidence as to the actual date of his testimony, Bailey testified that

[6] One of the realities of prison life is that inmates do not keep track of time (App. 46-47, 176; Tr. 170, 589). Although the inmate witnesses could not give exact dates for these incidents, most of them were able to fix late July and August as the time period during which the beatings and threats took place (App. 46, 47, 104, 105, 107, 112, 113, 185; Tr. 170, 384, 385, 389, 396-99, 630).

to the best of his recollection it took place in July (App. 142; Tr. 468). For reasons that were never explained at trial, Bailey continued to be confined at the D.C. Jail until August 26, 1976. There was extensive testimony showing that from the time of his arrival at the jail, Bailey was threatened and beaten by guards, who first sought to dissuade him from testifying in Brad King's behalf and, after he had done so, sought to punish him.

Upon his arrival at the jail, Bailey had been lodged in "Northeast Three," a tier where inmates enjoyed full privileges (App. 143; Tr. 470). Subsequently, a Captain Dickinson, accompanied by several other officers, came to Bailey's section and moved him to Northeast One, the maximum security tier, where he was placed in "dead lock" (App. 144-45; Tr. 472-73). He testified that Captain Dickinson told him, "I'm just letting you know this is an example of what you'll be getting if you testify in the Brad King case." (App. 145; Tr. 473.) He also told Bailey, " 'Now, this is just to let you know what I can do.' 'You know now I'm not going to show you what I can really do until after I see what you do on the stand, if you take it.' " (*Id.*)

Bailey testified that three correctional officers—Major Long, Officer Webb, and Captain Dickinson—warned him of the consequences of his testifying in the Brad King case (App. 142, 170; Tr. 469, 566). He was told that "if I was to testify in this case * * * I would never leave the jail alive," and that he'd be left "'hanging like the guy that was left hanging in the

Brad King case,' and this guy was killed." (App. 142; Tr. 469.)

Threats were conveyed indirectly as well as directly. Oliver Boling, another inmate, testified that in late July (App. 102; Tr. 381), Captain Dickinson, Officer Webb, and Sgt. Curran had come to his cell one morning, threatened to "bust [his] God damn ass," and said:

> " 'God dammit we're going to get your buddy, that nigger Bailey.' 'We're going to kill him.' And, Officer Webb went into his pocket and pulled out a little knife, looked like a Boy Scout knife and said, 'We're going to do it nice and quiet.' " (App. 94; Tr. 369.)

Two days later, Boling had a chance to describe the incident to Bailey (App. 102; Tr. 381). According to Bailey's testimony, Boling told him that the death threat had occurred, that he didn't know why they told him or the reason for the threat, and that he (Boling) didn't want to get involved (App. 159; Tr. 537).

Respondent Cooley was also aware that threats had been made against Bailey (App. 121; Tr. 411). Cooley had been told,

> " 'Yeah, you tell your buddy, Mr. Bailey, that—since he likes going to court and testifying for everybody, this, that and the other, and he likes Mr. Brad King so much, you can tell him we going to kill him and see if Brad King can't pay for that.' " (App. 121-22; Tr. 411.)

Garland Hines did not know Bailey personally but was aware that guards had made a threat against Bailey and respondent Cooley because he overheard the following from Captain Dickinson or Officer Webb:

> "[H]e said, 'The next time a fire is set in here . . .'—he was going to open Mr. Sonny's [Bailey's] cell and Ronald Cooley's you understand, he was going to kill him because he knows he was responsible for doing it." (App. 110; Tr. 394. See also App. 107, 108; Tr. 389, 390.)

After Bernard Wilson, another inmate, was beaten himself by correctional officers (see p. 10 *supra*), he was told:

> "'[S]ince he's one of your buddies you deliver him [Bailey] this message. You tell him that we are going to kill him and he's also going to receive some of the treatment that you just received for testifying in the Brad King case this summer.' " (App. 36; Tr. 154.)

These threats culminated in a series of violent attacks on Bailey. Oliver Boling, who testified to one of the threats against Bailey (*supra*), testified that in early August (App. 101; Tr. 380), he heard an attack take place in Bailey's cell. He described the episode as follows:

> "Well, first of all my cell is, like five cells like I said once before, down from him. One particular evening I heard this racket at the door, because I'm right at the door, and it is about six or seven

> guards came into the cellblock, you know, they came in, they came right down to Bailey's cell. One pulled out a blackjack, the other reached in his pocket and pulled out a can of mace and they proceeded into the cell, then I heard a couple of moans, a couple of groans you know. Then they came out of the cell and shut the cell back and then that was it." (App. 94; Tr. 366.)

Boling testified on cross-examination that he could see Bailey because "he was hanging halfway outside the door." (App. 101; Tr. 379.) Bailey himself testified that Officer Webb "came to my cell with several other officers, and choked me up." (App. 159; Tr. 538.) Garland Hines also testified that Bailey was beaten up in his cell by guards, and he thought that the attack had taken place in the second week of August (App. 110; Tr. 393).

Bailey recounted two other instances when he was assaulted by guards. In one, an officer named R. Brown hit Bailey on the head with a flashlight and threatened to kill him (App. 147; Tr. 477). Bailey immediately complained to Lt. Johnson that Brown had threatened him (App. 149; Tr. 479). Lt. Johnson filed a report (*id.*).

The other incident occured on one of the days Bailey was either testifying in the Brad King case or was being interviewed by King's attorney (App. 146; Tr. 475). Bailey testified that he was walking up the hall when a convict hit him in the face. When Bailey hit him back, "Officer Graves, he ran up and started

beating me with one of the slapjacks." (App. 147; Tr. 476.) After describing a "slapjack" as being a piece of leather with a steel insert (*id.*), Bailey testified:

> "They put some kind of—they put it on their hand and hit you with it. So, this officer started hitting me. I hit him back. The officer, Officer Graves ran up, started beating me with his fist. He beat me down to the ground. Carl Dickson was being escorted with me. He persuaded the officers to stop them from beating me. He explained to them he'd kill me if he continued beating me in the head. I was on the ground. * * *" (*Id.*)

Subsequently, Bailey had a hearing on the Graves incident at which Lt. Robinson was present (App. 150; Tr. 480-81). Bailey told him about Graves' assault on him. Lt. Robinson said, " 'We're not going to deal with that.' 'We're going to deal about the fight you had with the other inmate.' " (*Id.*) Bailey asked them to investigate the incident, but to his knowledge they never did.

Because he could not get an investigation or any assistance from the officers, on July 9, 1976, Bailey filed a suit in the Superior Court of the District of Columbia against Graves, his superiors (App. 151; Tr. 493), and the District of Columbia (App. 18).[7] His

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[7] Bailey's Exhibit 10 consisted of three separate documents, described at App. 150-52; Tr. 482-85. The record contains only one of these documents, reproduced at App. 18. Counsel for respondent Bailey has examined the files in both lower courts

purpose in filing the lawsuit was to "stop the administrators from threatening my life." (App. 176; Tr. 590.)

Filing the lawsuit provoked further threats by jail officials. Officer Graves approached Bailey and warned him that, if he didn't withdraw the suit, "and if I was ever placed in a secluded area, they could lead me off, that they would do something to me." (App. 155; Tr. 530.) Bailey testified further that guards came to his cell and told him he was being moved to the hospital. When he refused, a number of guards came down to his cell, took the door off, got him down and handcuffed him, and hit him several times. He was taken to Southeast Three, the ward for all mental patients. (App. 155; Tr. 530-31.)

Bailey had brought the threats against him to the attention of jail officials (App. 173; Tr. 574). Lt. Robinson, Assistant Administrator of Operations, tes-

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and determined that the other two documents, including the complaint, are missing. An examination of the records of the Superior Court of the District of Columbia shows a complaint dated July 9, 1976, an application for in forma pauperis status dated September 28, 1976, and a notice from the Court to Bailey dated December 28, 1976. In addition to seeking money damages for an alleged assault by Officer Graves on or about June 23, 1976, the complaint sought "injunctive relief to stop violations under the Fifth and Sixth Amendments." The Superior Court ordered the constitutional claims dismissed for lack of jurisdiction but permitted the plaintiff to proceed on the common law torts of assault and battery. On June 28, 1977, the Superior Court ordered the complaint dismissed with prejudice.

tified that Bailey had complained both to him and to the adjustment board about threats by guards under his supervision at the jail (App. 61; Tr. 239). But he couldn't remember whether it was before or after the escape (*id.*). He conceded that it was "quite possibly correct" that Bailey had complained about threats of bodily injury by guards (App. 62; Tr. 240).

Bailey used no force to leave the jail. His testimony, uncontradicted by any government witness, was that in the early morning hours of August 26th, he found the door to his cell open (App. 165; Tr. 548). He got dressed and walked up the tier to find out what was happening, and passed an open cell with the whole window out. He climbed out the window and left by climbing down some sheets that were already hanging out the window (App. 167-68; Tr. 561-63). Bailey was in fear of his life, and when he saw the opportunity, he took it (App. 179; Tr. 594-95). He explained the reasons for his departure as follows:

> "All of these threats had been placed upon me and various individuals had been telling me that the officers going to kill me, take my life for testifying in the Brad King case, and they showed me what they would do, you know, by what Officer Graves did, what Officer R. Brown did, and what Officer Webb did to me. I was in constant fear of my life, you know, and I don't want you to think that it is just because of this incident that I was in fear, you know, but like one particular time—I can show you the scars I have. I was beat before, see? I received this. And

see, this. And almost died from this. I know them people are serious about when they talk about taking your life. See, there ain't no doubt in my mind about that. I had that much fear in me." (App. 164-65; Tr. 548.)

(ii) Respondent Cooley. Respondent Cooley was also threatened and beaten by correctional officers during his stay at the D. C. Jail. During the time of his confinement,[8] he was lodged in a windowless cell in Northeast One.

Oliver Boling was a witness to several of the incidents involving Cooley. He saw two or three guards back Cooley into a corner and hit him in the mouth with a "slapjack" (App. 97-98; Tr. 374.) He also saw him "roughed up quite a few times in front of my cell." (App. 98; Tr. 374.) On two other occasions, he heard guards say "they were going to kick [Cooley's] ass good." (App. 98; Tr. 375.)

Inmate Garland Hines testified that guards came into Cooley's cell on more than one occasion, threatening him and "jump[ing] on him a few times." (App. 106; Tr. 388.) Hines described another incident in more detail:

> "* * * Mr. Cooley was going down the hallway and one officer was pushing him. Mr. Cooley said 'You don't have to push me. * * * I can walk.' At

[8] At the time of the escape on August 26, 1976, Cooley had been confined at the D.C. Jail since April 10, 1976. See Gov. Exhibit 8.

> the time he was handcuffed. Officer Smith said, 'Look, just shut up, keep moving.' * * * Cooley turned around trying to defend himself. He turned around and the officer pushed him. Officer Smith pulled out a big stick, a blackjack, and hit him across the face. Another officer—I don't recall his name, I know him when I see him, he sprayed some gas in his face. Mr. Cooley came on the unit and his face was bleeding * * *." (App. 106; Tr. 387-88.)

On a subsequent occasion, in the early part of August (App. 113; Tr. 398-99), Hines saw Captain Dickinson, Officer Webb and some unidentified guards go into first Cooley's cell and then "Sonny's" cell. Dickinson said, "If another fire's set tonight or any other time, I'm going to have both of your cells, and I'm going to come down and kill you." Then Webb said, "I'm coming in there, too, because I don't want you anyway." (App. 107; Tr. 389.)

Other inmates witnessed similar incidents, or observed injuries that Cooley had sustained at the hands of the guards. Respondent Bailey saw a couple of guards "jump" Cooley, throw him in his cell, and beat him (App. 166-67; Tr. 552-53). Thomas W. Robinson saw two guards with slapjacks "dragging Mr. Cooley on the escalators, * * * and I heard him hollering. * * * Mr. Cooley said, 'Stop hitting on me.' When the officer brought him around the corner he hit him up side the head." (App. 185-86; Tr. 630-31.) Finally, Bernard Wilson saw Cooley vomit "some kind of black stuff." (App. 46; Tr. 170.) Wilson also testified that

the "few times" the guards allowed Cooley to take a shower they "would be intimidating him or something like that, pushing him down to the shower, telling him to take a shower with the handcuffs and shackles." (App. 47; Tr. 171.)

Cooley also testified in his own behalf, stating that he had been beaten "quite a few times." He remembered the exact date of one incident—August 9—because he had been in court that day. Upon his return to the jail at 2:30 p.m., he was placed in a holding cell where he remained until 10:30 p.m. Before taking Cooley back to his own cell, Officer Brown ordered him to strip. He then proceeded to pick a fight with Cooley. Six other officers joined in, beating Cooley with plastic flashlights and pushing him to his cell (App. 116-17; Tr. 403-04).

Cooley complained about these beatings to a D. C. Superior Court judge; he complained to jail officials. But he noticed no response: "They act like they don't believe nothing I say. They don't believe nothing else. You ain't going to put it on paper." He also attempted to call his lawyer, but was not allowed a phone call (App. 117; Tr. 404-05).

All of these threats and beatings led Cooley to leave the jail on August 26 (App. 130; Tr. 424). Moreover, he testified that the threats of his codefendants, Bailey and Walker, precipitated his action (App. 118; Tr. 405-06).

(c) Evidence of inadequate medical assistance. Finally, respondent Walker introduced evidence that he had received inadequate medical treatment for his epileptic condition. Two inmate witnesses testified that they had witnessed respondent Walker having epileptic seizures while he was confined in Northeast One (App. 182-83, 185; Tr. 603-04, 625). Walker's brother testified that Walker had had many seizures while growing up (App. 187-88; Tr. 650-52). Walker examined the Chief Medical Officer of the D.C. Jail at length to demonstrate that the treatment he was receiving, or the supervision of that treatment, was inadequate (App. 133-38; Tr. 437, 454).[9]

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[9] Dr. Samuel Bullock, the Chief Medical Officer for the jail, testified that when Walker arrived at the jail he was prescribed dilantin-phenobarbital for epileptic seizures, on Walker's report of a history of such seizures (App. 133-34, 139-40; Tr. 438-39; 456-58). The dosage was ¼ gram four times a day (App. 138; Tr. 455) or three times a day (App. 140; Tr. 458). His testimony was confused on whether such medication, given on a trial basis (App. 134; Tr. 439), required a cut-off date or not. Compare App. 134; Tr. 439, 459, with App. 137; Tr. 443. His testimony about the medical records from the jail, Walker Exhibit 2-A, p. 1, also left room for question on the extent to which those records confirmed proper receipt of the medication. The exhibit, according to Dr. Bullock, showed receipt of medication on twelve dates (App. 139; Tr. 455). The exhibit gives these dates as June 15, July 4, 5, 6, 7, 9, 15, 22, August 10, 11, 13, 26—a highly irregular schedule for supplying medication required four times a day.

Other witnesses testified to inadequate medical assistance for smoke inhalation or burns (App. 35, 163; Tr. 152, 545).

(d) Justifications of the failures to return. All of the defendants testified to the reasons for their failures to return to custody. Respondent Bailey testified:

> "I was in fear of my life. I know that if I turned myself in I would still be under the threats of death. Always knew that the FBI wanted to kill me, after I escaped, so I was in limbo. I didn't know what to do. I did have some people call to the officials at the jail on several occasions." (App. 175; Tr. 587.)[10]

Bailey testified in addition that he knew if he surrendered himself he would be returned to Northeast One and the guards would be the same guards who were there before he left (*id.*). He had heard that the FBI was looking for him but didn't feel he could tell the FBI that he did not want to return to the D.C. Jail and Northeast One because "the FBI was telling my people that they was going to shoot me." (App. 175-76; Tr. 587-88.) There was no testimony that when Bailey was arrested on November 19, 1976, at an apartment in the District of Columbia, he offered any resistance.

[10] While the Government apparently finds it significant that Bailey did not identify the individuals who placed calls on his behalf (Pet. Br. 6), it fails to point out that Government counsel did not ask Bailey to identify the callers. See App. 168-69; Tr. 563-64.

Respondent Cooley testified that his family had attempted unsuccessfully to get in touch with somebody in authority after his escape (App. 119; Tr. 407). He did not try to call anyone himself because he did not know whom to call, because of his problems at the jail, and because he was afraid for his life (App. 119; Tr. 408). "They probably came [*sic*] and got me, and then make me try to run and they shoot me in half when they come and get me." (*Id.*) He remained in Washington, D.C., after his escape (App. 120; Tr. 408).

Respondent Walker testified that he contacted the FBI on a number of occasions after his escape.

> "As a matter of fact I kept a constant rapport with the FBI. I had people who told me that they had brought this information to my sisters that the FBI said that if they ran down on me they was going to kill me. So, in actuality I was never out of immediate threat of losing my life. If I would have given myself up I had this FBI threat to contend with and I also had to go back over to the same jail that I had just left from, and this was the reason that I consequently never turned myself into the authorities." App. 195; Tr. 710-11.

More specifically, he contended that he called the FBI on the second day after he was out, identified himself, told the agent he spoke to "that I would surrender myself if I wasn't being subjected to the same conditions and put on the same penitentiary that I had just left from." (App. 196, 198; Tr. 712, 718.) He had described "how terminal the conditions were" in

Northeast One and asked "was it any kind of way that I could get with him to make some type of arrangements as far as turning myself in, if I would have to go back to [the D.C. Jail]." (App. 197; Tr. 715-16).

Approximately ten days later, Walker testified, he had had another conversation with the agent and "indicated to him if he could work out the conditions for which I wanted to turn myself in, I would turn myself in." (App. 198; Tr. 718-19.) Those conditions were that he wouldn't be harmed and wouldn't be returned to the D.C. Jail (*id.*).

Approximately one month later, Walker further testified, he called the FBI again and offered to turn himself in under the same conditions (App. 199; Tr. 720). Walker testified that the FBI agent had agreed that he wouldn't be harmed by members of the FBI, but had not agreed that he wouldn't be returned to the D.C. Jail (App. 200; Tr. 722).

Walker was also arrested in the District of Columbia (App. 27; Tr. 66).

3. The Rulings on Duress or Necessity

From the very beginning of the trial, the Government took the position that, regardless of what evidence of duress or necessity might be presented by the defendants to justify their initial departure, they could not raise the defense because they failed to turn themselves in. (App. 20; Tr. 2. See also R. 35, the

memorandum of law filed by the Government, at pp. 7-8.)

After the government had rested, and after the defense had put on their first witness, the Government raised its "failure to return" argument again, asking that the defendants be required to make a proffer as to how they intended to satisfy the return requirement (App.52; Tr.188). The court, though indicating that it agreed with the return requirement, deferred the matter (App. 54; Tr. 191).

At the end of the fourth day of trial, the court requested counsel to submit proposed instructions (Tr. 658-59). The critical language of the respondents' proposed instruction on duress[11] is set forth in the margin.

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[11] "Coercion which would excuse the commission of a criminal act must result from:

"1) Threathening [*sic*] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

"2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

"3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

"4) The defendant committed the act to avoid the threathened [*sic*] harm." (App. 17; R. 32A.)

No other proposed instructions appear in the record.

At the beginning of the fifth and last day of trial the Court said:

> "Now the problem the Court has with the defense of duress and coercion in this case is that there is no showing by you or by any other defendant that you turned yourselves in after you made your escape. That is an essential ingredient. For that reason, I don't think I'm going to instruct upon duress or coercion." (App. 189; Tr. 667.)

Later in the day, the Court referred back to the statement just quoted and said:

> "Well, the Court reached that conclusion after having written a fairly extensive instruction on the subject of duress and coercion and having studied the cases over the weekend. The Court concluded that in order to avail one's self of the defense, one must notify the authorities of his whereabouts or turn himself in, that one is not exonerated by affecting an escape regardless of the conditions, unless one takes that action. That is the ruling of the Court. * * *" (App. 201; Tr. 725.)

The last discussion about duress occurred after the close of all of the evidence (App. 213-21; Tr. 769-81).[12]

[12] The court also indicated at this time, in response to a question from counsel seeking to argue lack of specific intent, that it would instruct that escape was a crime of general intent (App. 216; Tr. 773-74).

At the conclusion of the discussion, the Court reiterated:

> "Had these men notified the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender, then I would have permitted the duress and condition argument. In fact, I have here an instruction, which I drew up very carefully with that in mind, but I realized that at the end of which I was calling upon the jury to make a finding that they couldn't make, that is to say that these men had turned themselves in and that is a prerequisite to the assertion of the defense of duress, or coercion. So for that reason I decided that I had to assume the responsibility for myself." App. 219-20; Tr. 778-79.

At no time in the course of any discussions about duress had the Government asked the court to rule that defendants had not introduced sufficient evidence of threats of "immediate" harm to entitle their defense of duress or coercion to go to the jury.

4. Instructions to the Jury

After some general instructions on the meaning of intent (App. 221-22; Tr. 799-800), the court instructed the jury that the offense charged was an escape on August 26, 1976.[13] The court concluded this part of

[13] "These essential elements are as follows: First, *that at the time of the offense in the indictment, that is to say August 26th, 1976,* the defendant in question * * * had been convicted of a felony.

the instructions by saying that the intent required by § 751(a)

> "is the general intent, and it means only that a defendant has the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally." (App. 224; Tr. 803.)

Finally, the court instructed the jury that it could not consider respondents' evidence of duress because they had failed to show that, after escaping, they had turned themselves in.[14]

"* * *

"*And at the time the offense took place* he was serving time for this conviction. * * *

"The second essential element * * * is that as a result of the conviction the defendant was committed to the custody of the Attorney General or designated representative, *and was in custody at the time of the offense.*

"* * * *

"The third essential element * * * is that the defendant escaped from such custody. The question is simply, whether the defendant without authorization did absent himself from his place of confinement." (App. 222-23; Tr. 801-02. Emphasis added.)

[14] "You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

"If a particular inmate or group of inmates feel that they have been treated unfairly, they may seek correction of those conditions in the court system, but they are not entitled to commit the offense of escape or seek to take the law into their hands.

"Now, the Court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping turned himself in, then the defense of coercion or duress may be brought to the attention of the jury as a defense, but only if a defendant turns himself in.

"Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the Court heard the evidence, that was not done in this case. So the Court felt that it was incumbent upon the Court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in." (App. 224-25; Tr. 806-07.)

C. Respondent Cogdell

Respondent Cogdell was tried two months later before the same trial judge. The Government's evidence, besides going to custody within the meaning of the statute and showing that, like the other respondents, Cogdell had escaped from the New Detention Center in the morning of August 26, 1976, showed that Mr. Cogdell had been apprehended on September 28, 1976 (I Cogdell Tr. 26, 56). Mr. Cogdell proffered at trial evidence of duress or coercion both as a defense to the charge of escape and as a reason for his failure to turn himself in. Counsel expressly asked the trial judge to take into account "all of the testimony" heard in the earlier case. The trial judge agreed that he had, and

stated that he was excluding all testimony about duress or coercion, because respondent did not turn himself in to state or federal authorities. (See App. 228-30; I Cogdell Tr. 11-15.)[15]

The judge's instructions to the jury were essentially similar to those given at the trial of respondents Bailey *et al.* (App. 231-33; II Cogdell Tr. 110-13). Instructions relating to duress or coercion were omitted since no such evidence had been allowed in.

D. The Decision of the Court of Appeals

The court of appeals reversed respondents' convictions and remanded for new trials on the failure of the trial judge to instruct the jury correctly on intent and on the relevant defense (Pet. App. 1a-27a, 101a-102a).[16]

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[15] The Government contends that Cogdell admitted that he had not attempted to contact the authorities after the escape (Pet. Br. 9, 42). This is incorrect. Cogdell never testified at trial (Tr. May 9, 1977, at 62). As noted, he offered to prove that his apprehension of bodily harm continued unabated even *during* the period of escape.

[16] Each of the respondents raised issues relating to the proof of or instruction on "custody" within the meaning of § 751(a), and each lost on these issues (Pet. App. 27a-34a, 104a-113a). Since the arguments of respondents Bailey, Walker, and Cogdell would have required dismissals of the indictments, those respondents presented their custody arguments on conditional cross-petitions for writ of certiorari (Nos. 78-5904, 78-5889, and 78-5887, respectively). Those petitions were denied on March 19, 1979.

Respondents Bailey, Cooley, and Walker presented additional arguments as well, which were not ruled upon by the court of appeals. Pet. App. 35a nn.67-68. Accordingly, if the judgment of the court of appeals is reversed, these cases must be remanded to the court of appeals for further proceedings.

(a) Intent. The court found, in agreement with *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974), that "a great deal of unnecessary confusion has been generated by the use of ill-defined terms and concepts such as 'specific' and 'general' intent." Pet. App. 6a. In further agreement with *Nix*, the court concluded "that an 'escape' occurs when a defendant (1) leaves custody (2) voluntarily, (3) without permission, and (4) with an intent to avoid confinement." Pet. App. 8a.[17]

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[17] The intent element was elaborated in a footnote, where the court said, *inter alia:*

> "[I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of 'confinement'—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such 'non-confinement' conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement. * * *" Pet. App. 9a n.17 (emphasis in original).

The court stated that in the ordinary case the prosecution can establish a *prima facie* case that a defendant "escaped" merely by offering evidence that the defendant departed from custody without permission. The defense, however, has the opportunity to introduce evidence of jail conditions, threats, and violence in an effort to raise a reasonable doubt about whether defendants acted "voluntarily" or intended to "avoid confinement." Pet. App. 9a-10a. This evidence can be rebutted by the Government. Pet. App. 11a. In such a case, when instructing the jury,

> "the judge should direct the jurors' attention to those considerations that require special emphasis. In addition to specifying the major indicia of voluntariness and intent—the immediacy, specificity, and severity of any alleged threats or fears, the availability of viable alternatives to unauthorized departure, and the defendant's decision whether and when to return to custody—the court should remind the jury of the inevitable difficulties associated with prison discipline and of the possible biases of defense and prosecution witnesses testifying with respect to that aspect of the case." Pet. App. 11a-12a.

The court emphasized that it is the jury "that must make the final determination whether the prosecution has met its burden of proving each of the elements of the crime beyond a reasonable doubt." *Id.*

Since the trial court had not instructed the jury in the terms specified by the court of appeals, the convictions had to be reversed.

(b) The choice-of-evils defense. Turning to the trial court's refusal to let the jury consider the defense of "duress," the court of appeals noted that "[t]here is some theoretical confusion over the nature of the defenses of duress and necessity, especially in the context of prison escape cases." Pet. App. 16a. It described one of the two general principles involved as "duress as compulsion," in the sense that a "person will not be held responsible for an offense he commits under threats or conditions that a person of ordinary firmness would have been unable to resist." Pet. App. 17a. The court stated that this principle "like the defenses of intoxication, insanity, and mistake, negates the intent or voluntariness elements of an offense." *Id.* The defense based on this principal was discussed no further, since it had been addressed in the earlier part of the opinion on "intent."

The court described the other general principle reflected in duress/necessity cases as one of "justification by choice of the lesser evil—*i.e.*, that a person is not guilty of an offense if he committed it because he reasonably believed his action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the defense." Pet. App. 19a. With regard to this defense,[18] the court stated that this particular case

> 'in its present posture at most presents the relatively narrow question whether a jury should be

[18] Although respondents' proposed instruction (App. 17; R. 32A) had been phrased in terms of coercion or duress, as had

allowed to consider an otherwise sufficiently supported choice of evils defense in the absence of *one* of the special prerequisites some courts have imposed upon such defenses in escape cases—the requirement that an escapee turn himself in to the authorities immediately after escaping." Pet. App. 21a-22a. (Citing *People* v. *Lovercamp*, 43 Cal. App. 3d 832, 118 Cal. Rptr. 110 (1974).)

Although this requirement had been endorsed in *United States* v. *Michelson*, 559 F.2d 567 (9th Cir. 1977), the court found that the Ninth Circuit's analysis had been based "on the critical assumption that escape is a 'continuing' offense, *i.e.*, that one may commit the crime of escape, even if his original departure from custody was justified, by failing or refusing to *return* to custody once the justifying circumstance is no longer present." Pet. App. 23a. Whatever the validity of that assumption, the court found it inappropriate in this case. The court said:

> "Even if we accept the notion on which the requirement is based—that escape is a continuing offense—this theory was not reflected in the indictment or the trial court's charge to the jury.

most of the discussions before the trial court, the court of appeals found the proposed instruction broad enough to raise a choice-of-evils defense, given the theoretical confusion over labels found in most cases. Pet. App. 18a-19a n.32. The Government has not challenged this conclusion.

> * * * [T]his is not a case where the jury was considering whether a defendant had escaped by failing to return." Pet. App. 24a-25a.[19]

Accordingly, the trial court erred in denying a choice of evils instruction "on the ground that the defendants had not returned or adequately explained their continued absence." Pet. App. 25a. The court concluded:

> "In effect, the trial court denied appellants' right to have the jury consider a duress defense to the crime with which they had been charged (escaping on August 26) because the *court* found that they would in any event be guilty of an offense *under a theory (failure to return) that was never presented either to appellants or to the jury.* We

[19] This passage is the only mention in the text of whether escape might be a "continuing offense." In the intent section of its opinion, the court of appeals had noted that respondents had argued that in order to violate § 751(a) a defendant must have the requisite intent at the time he leaves custody. The court rejected that argument, saying that it agreed with other decisions there cited "that the trial court should instruct the jury that a prisoner who lacks the intent to avoid confinement at the time he leaves custody may nevertheless commit the crime of escape if he later forms this intent and therefore fails to report to the authorities or to turn himself in." Pet. App. 9a-10a n.17. See also Pet. App. 26a n.52. In the text, however, the court only *assumed* that escape was a continuing offense (Pet. App. 24a-25a), and in another footnote it recognized "some force" in the argument that it is not such an offense (Pet. App. 25a n.48).

cannot sanction such an obvious violation of appellants' constitutional right to jury trial." Pet. App. 25a-26a (emphasis in original).

In view of this ruling, the court stated that "[u]nder the circumstances of this case it is unnecessary for us to consider exhaustively the proper prerequisites to a choice of evils defense in escape cases." Pet. App. 26a.

(c) The immediacy requirement. According to the Government, the court of appeals "dismissed the traditional duress requirement of imminent or 'immediate harm' in the escape cases." (Pet. Br. 12.) The Government is in error. Not only did the court expressly state that "the immediacy, specificity, and severity of any alleged threats or fears" was a relevant consideration for the jury (Pet. App. 11a-12a), but it appears that the court of appeals found adequate evidence of danger of "immediate harm." In its brief as appellee in the court of appeals, the Government did not list an issue on appeal that respondents had not presented sufficient evidence of threats of immediate harm. The relevant argument section of its brief was focused entirely on defending the trial court's ruling on its own terms—that the return requirement was appropriate to any duress or coercion defense in escape cases and that respondents had failed to meet it. It was only in a footnote at the end of this argument that the Government mentioned an

"immediacy requirement."[20] Accordingly, the court of appeals was presented with no detailed argument at all about the meaning of the "immediacy requirement" or its application to this case.

Under these circumstances, the court of appeals manifestly treated the Government as having conceded, for all practical purposes, the adequacy of the duress evidence presented by respondents, apart from the issue of return of custody. The court noted specifically that the trial court would have given an instruction on duress but for the failure to return, and continued: "Since the court's instruction would have been given but for the return requirement, the choice of evils issue in this case turns on the validity of that requirement." Pet. App. 22a-23a n.43. In another footnote, the court observed that the dissent argued that respondents failed to present sufficient evidence

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[20] The footnote reads: "Evidence as to the other requirements discussed in *Lovercamp* was also sadly lacking. The conditions described by numerous witnesses called by the defense could hardly be found to establish the seriousness, immediacy, and imminence of the alleged danger to appellants' well-being. The record is devoid of any reference to an assault or even the utterance of a threat within two weeks before the escape." Brief for Appellee, D.C. Cir. No. 77-1404 *et al.*, at 28 n.29. No mention appears of the evidence of danger of smoke inhalation from fires set "every day."

of harm to be avoided to get to the jury. The court replied:

> "The dissent's view on this point contradicts the opinion of the trial court, which was willing to submit a 'duress' instruction except for appellants' failure to meet the return requirement. * * * In our view the trial court's conclusion that the evidence on this point was sufficient to submit to the jury was clearly correct." Pet. App. 21a n.39.

The court then added:

> "The dissent's narrow insistence on threats of 'immediate' harm as an absolute prerequisite for the choice of evils defense seems particularly inappropriate in escape cases, where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes 'immediate' in the narrow sense urged by the dissent." *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The question raised by this appeal is not whether the respondents should be acquitted of the crime of escape, but rather whether a new trial should be ordered so that they may have the opportunity, hitherto denied them, of having the jury decide whether their escapes were to avoid conditions that put them in

danger of serious bodily injury or death and were therefore not culpable.[21]

> "An accused is entitled to a jury determination of his guilt or innocence, and it is his constitutional right to present any and all competent matters in his defense. A right to a trial by jury and the right to adduce evidence in his behalf are two of the fundamentals inherent in the due process guarantee of a fair trial. *In re Oliver*, 333 U.S. 257, 273 (1948). Thus, where an accused asserts a defense sanctioned by law to justify or to excuse the criminal conduct charged, and there is some credible evidence to support it, the issue is one of fact that must be submitted to the jury." *State* v. *Horn*, 58 Haw. 252, 566 P.2d 1378, 1380 (1977).

This Court has recently overturned judgments of conviction where instructions were deemed to invade the fact-finding function "which in a criminal case the law assigns solely to the jury." *Sandstrom* v. *Montana*, 61 L. Ed. 2d 39 (June 18, 1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446 (1978).

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[21] A prosecution for escape only occurs after the prisoner has turned himself in or has been recaptured. Unlike most prosecutions, if the defendant is acquitted he will not be set free because invariably he will have to finish serving his original sentence. So the only issue is whether the facts and circumstances demonstrate a need for additional punishment to be imposed due to his unauthorized departure. That, of course, is the situation in the cases before this Court.

In this case, not only did the trial court refuse to permit the jury to consider substantial evidence of fires, threats and beatings as a basis for a choice-of-evils defense, but also instructed the jury that evidence of life-threatening assaults and other conditions was irrelevant to the issue of the respondents' intent in escaping. These actions violated the respondents' right to jury trial.

I

A. The Government concedes that some form of duress defense is available in the context of a prison escape. But it asks the Court to place special restrictions on its availability and make them essential preconditions to raising the defense. Two of these are that the defendant must turn himself in to the authorities as soon as he reaches a position of safety, and that the threat to his life or personal safety must immediately precede the escape. This position is based on a fundamental misreading of *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), which stressed that the conditions prerequisite to raising the defense are questions of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances. Even if the case can be read to support the Government's interpretation, it is of course not binding on this Court, which must decide the appropriate principles to be applied by the federal courts.

The stringent rule urged by the Government has been rejected in well-considered decisions by the supreme courts of Michigan, Illinois, and New Mexico, on the ground that it would impinge on the fact-finding function of the jury. The defendant's culpability must be determined by the jury in light of all the circumstances, and failure to return is but one factor, albeit an important one, that goes to the weight of the evidence. The unstated premise of the Government's argument is that juries cannot be trusted to evaluate all the evidence, including failure to return, and arrive at an appropriate verdict of guilt or innocence based on the weight of the evidence and the credibility of the witnesses. The Government's position is neither necessary to serve legitimate societal interests nor compatible with the constitutional requirement of trial by jury.

B. The offense for which the respondents were indicted and convicted was the initial departure from custody on August 26, 1976, and for events which took place thereafter. The duress defense went to this event. Neither the indictment nor the court's instructions to the jury were based on a theory of continued absence. The jury could only have convicted the respondents for leaving custody and not for remaining absent. The failure of the judge to permit the respondents to defend against the crime with which they were charged invaded the jury's fact-finding function and requires a reversal of the conviction. While failure to

return might be some evidence for the jury to consider as to the existence of duress or choice of evils, it violated due process to bar the defense, particularly where the respondents were not charged with continued absence and the jury not so instructed.

Furthermore, due process requires that on appeal the validity of the respondents' convictions be appraised on the same basis as the case was tried and as the issues were determined in the trial court. *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876); *Russell* v. *United States*, 369 U.S. 749, 766 (1962). Where respondents were convicted of the initial departure, their convictions cannot be upheld on the different theory that they violated § 751(a) by their failure to return.

C. By imposing on respondents a requirement that they turn themselves in to proper authorities before they could claim a defense of duress or necessity to the charge of escape from prison, the district court effectively penalized them for conduct that took place after their departure from custody was complete. But 18 U.S.C. § 751(a) does not make failure to return a crime.

Prior to 1930, when the federal escape statute was enacted, it was well established that the offense of escape only prohibited the actual departure from lawful confinement. Both state and federal precedents from that era support the view that escape was not a continuing offense. In the absence of evidence to the

contrary, it must be presumed that Congress intended to incorporate that learning in the new statute.

Nor is escape a continuing offense under accepted canons of statutory construction. Criminal statutes must be strictly construed against the Government. The continuing offense doctrine is applied only in limited circumstances. *Toussie* v. *United States*, 397 U.S. 112, 115 (1970). The courts have found continuing offenses only where the evidence of congressional intent is so strong as to make the conclusion almost axiomatic. Section 751(a), and its legislative history, is barren of any language that would suggest that the offense includes anything more than the act of departing. To hold otherwise would violate the established principle that questions regarding the scope of a criminal statute must be resolved in favor of lenity to the accused. *Dunn* v. *United States*, 60 L. Ed. 2d 743, 754 (June 4, 1979).

D. The Government claims that the evidence was insufficient as a matter of law to demonstrate that the threatened harm was imminent. The trial judge did not refuse to give the duress instruction on this ground; the instruction was not given solely because the respondents had failed to return to custody. The Government did not brief the immediacy issue in the court of appeals or in its petition for rehearing and suggestion for rehearing *en banc*. It was mentioned only tangentially by the court of appeals. This Court's

appellate jurisdiction is to review findings by the lower courts and not to decide evidentiary questions in the first instance.

In any event, what constitutes present, immediate and impending compulsion depends upon the circumstances of each case. The trend is to relax traditional notions of immediacy. This is particularly appropriate in the prison context where a prisoner may be exposed to long lasting, unrelenting pressure of threatened harm. There is sufficient evidence in the record concerning threats, beatings, lack of essential medical treatment and other life threatening conditions to create a question of fact for the jury.

II

The federal escape statute is silent as to the nature of the intent that must be shown to sustain a conviction. This is evident from the inclusion of both escape and attempted escape because the latter traditionally requires a showing of "specific" intent. The legislative history is similarly unenlightening. Nor does reference to early common law provide a reliable guide to Congress' intention considering the fact that conditions at common law were very different. This Court should adopt a standard of intent in light of the principles of the common law as they may be interpreted in light of reason and experience.

The Model Penal Code has rejected the traditional strict distinction between specific and general intent,

and the better reasoned opinions have eschewed labels in an effort to analyze and define the mental element of escape. See, *e.g.*, *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974); *Bavero* v. *State*, 347 So. 2d 781 (Fla. Dist. Ct. App. 1977); *Lewis* v. *State*, 318 So. 2d 529 (Fla. Dist. Ct. App. 1975), *cert. denied*, 334 So. 2d 608 (Fla. 1976). The essential mental element of escape is the intent to avoid confinement, and where a prisoner leaves solely to avoid life-threatening conditions of confinement, defined to include beatings, lack of *essential* medical treatment, and homosexual attack, the essential mental element is missing. In considering whether the mental element is present, the jury should be able to consider all the facts and circumstances from which the defendant's intent can be inferred, including the imminence of the harm, available alternatives, and failure or tardiness in returning.

Contrary to the Government's supposition, there is no evidence that this rule will lead to an increase in the incidence of prison escapes. Evaluation of the defendant's mental state is one of the traditional roles performed by the jury, and there is no reason to believe that the jury will not be able to carry out that function in the escape context and recognize cynical manipulation of the defense. The failure of the escaped prisoner to return or contact the authorities remains an extremely pertinent factor in evaluating his intent but is not, as a matter of law, dispositive of the issue.

ARGUMENT

I

The Trial Court Erred in Refusing to Instruct the Jury on the Defense of Duress or Choice of Evils

A. Failure to return to custody should not act as an absolute bar to a defense of duress or choice of evils in a federal prosecution for escape

1. Duress in the non-escape context

From ancient times the law has recognized that there are certain situations where behavior which would ordinarily violate the penal laws should not be punished. In one form or another, the defense of duress has been known to English law since the fourteenth century. *Lynch* v. *Director of Public Prosecutions*, [1975] 1 A.C. 653, 681, [1975] 1 All E.R. 913, 927 (H.L.).[22]

[22] The defenses were generally classified as duress, coercion, and necessity, although these distinctions were not always pure. Even though the underlying principles and limits of these doctrines have often been interwoven, and labels cannot be permitted to obscure basic principles, the court of appeals found that it aids analysis to distinguish between two independent strains which run through these defenses. The first basic principle—which the court of appeals refers to as "choice of evils"—recognizes that an individual may be placed in a predicament where whatever he does will harm himself or someone else. This defense justifies an act on the basis of a societal judgment as to which

While acknowledging the development of the defense, the government argues that the courts imposed limits on the defense from the outset because it "held within it the germs of potential disorder." Thus, "if believed by the jury—and proof of duress often consisted of little more than the accused's self-serving assertions—the defense operated to free defendants who had admittedly committed all the elements of a criminal offense." The Government states, quoting a law review article,[23] that "the business of excusing

conduct constitutes the greater injury. The second basic principle recognizes that an individual may be required to perform an act under threats or conditions that a person of ordinary firmness would be unable to resist. The former classification *justifies* an ordinarily wrongful act because under the circumstances it is in fact the "right thing to do," even though the actor intends to break the letter of the law. The latter category *excuses* the actor from criminal responsibility because the circumstances negative the intent or volitional element of the offense. The court of appeals gave separate consideration to these historical doctrines. The government, in its brief, refers generally to duress and does not differentiate between the "choice of evils" and "constraint upon the will" theories. Pet. Br. 22 n.13, 26 *et seq.* The argument in this part of respondents' brief is fully applicable to either theory of "duress."

[23] Newman & Weitzer, Duress, Free Will and the Criminal Law, 30 S. Cal. L. Rev. 313 (1957). This article strongly advocates entrusting all the issues raised by the duress defense to the jury. *Id.* 330-31. Particular attention should be given to the author's suggested revisions of the principles governing the defense which, in their view, were necessary "if there is to be a rational meaning to the rule that an act done from compulsion is not a crime." *Id.* 334.

individuals from crimes which, in the last analysis they had committed bodily, was a difficult and dangerous affair. Who could see or wisely guess at the presence of a will which freely motivated the body in that dreadful moment of criminal action?" (Pet. Br. 23-24.)

Surely, these are unremarkable observations with which we have no quarrel. But the same observations can be made of any defense to a criminal charge which justifies or excuses the commission of an act otherwise considered unlawful. Self-defense to a charge of murder, with its traditional element that one attacked must first retreat before using deadly force, provides an apt example. In 1921 this Court had to decide whether the standard for retreat was the common law objective standard of whether a man of reasonable prudence would have retreated or a subjective standard that the defendant himself had reasonable grounds of apprehension. In *Brown* v. *United States*, 256 U.S. 335 (1921), the Court, per Holmes, J., held that the ancient common law formulation was inadequate for the protection of the accused's rights. Justice Holmes observed that conditions had changed from the time at common law, when any man who killed another had to seek a pardon, and that rules developed under conditions very different from the present "have had a tendency to ossify into specific

rules without much regard for reason." 256 U.S. at 343. Instead of rigid rules, the court held:

> "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went further than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. * * * Detached reflection cannot be demanded in the presence of an uplifted knife." 256 U.S. at 343.

Thus the same concern which the government raises in this case—abuse of the defense by the unscrupulous—was resolved in favor of a flexible approach with the jury being the ultimate arbiter of the facts. *See* Newman & Weitzer, Duress, Free Will and the Criminal Law, 30 S. Cal. L. Rev. 313, 333-34 (1957).[24]

The Government points to three main limitations at common law which were designed to curb abuses (Pet. Br. 24). The first "limitation"is that the accused must have been threatened with immediate death or serious bodily harm. This is the traditional definition

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[24] Even the Government appears to accept the notion that common law restrictions on defenses such as duress should be relaxed, for they cite, with apparent approval, the amended version of S. 1 that "an affirmative defence of * * * duress * * * shall be determined by the courts of the United States according to the principles of the common law *as they may be interpreted in the light of reason and experience.*" (Pet. Br. 26 n.17, emphasis added.)

of what the defense requires but it is also true, both here and in England, that a threat of *future* injury may be sufficient depending upon the circumstances. American Law Institute, Model Penal Code § 2.09, Comment, p. 8 (Tent. Draft No. 10, 1960); *R.* v. *Hudson & Taylor,* [1971] 2 Q.B. 202, 207, [1971] 2 All E.R. 244, 247. As long as some evidence is introduced, the question is for the jury.

The second limitation is that the defense has not traditionally been recognized in cases of murder. But changing times have altered even this venerable rule, and it is now the law in England that the defense is available against a charge of second degree murder. *Lynch* v. *Director of Public Prosecutions, supra.*[25] Of course, this limitation has no applicability to this case.

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[25] The Model Penal Code would make the duress defense applicable in murder cases. "We think it obvious that even homicide may sometimes be the product of coercion that is truly irresistible, that danger to a loved one may have greater impact on a man of reasonable firmness than a danger to himself, and finally, that long and wasting pressure may break down resistance more effectively than a threat of immediate destruction." Model Penal Code, Sec. 2.09, Comment p. 8 (Tent. Draft No. 10, 1960).

A number of American jurisdictions provide for duress and choice-of-evils defenses by statute without excluding murder. See, *e.g.*, N.Y. Penal Law § 40.00 (1975); 18 Pa. Cons. Stat. Ann. § 309 (1972); Conn. Gen. Stat. § 53a-14 (1977); Hawaii Rev. Stat. §§ 703-231, 703-302 (1976); N.H. Rev. Stat. Ann. § 627:3 (1974).

The third limitation, also identified by Judge Wilkey in his dissent, Pet. App. 49a, is that the defendants have no reasonable opportunity to avoid the threatened harm. This goes to the availability of other options, short of committing a crime, to extricate oneself from danger. In most cases, this raises a question of fact for the jury. But to this the Government has engrafted a fourth "limitation" that, it claims, provides theoretical support for a "return requirement" in escape cases. This limitation is that the threat must have lasted for the duration of the otherwise criminal conduct. For this proposition the Government cites *Respublica* v. *M'Carty,* 2 U.S. (2 Dall.) 86 (Pa. 1781),[26] a treason case that demonstrates the important function played by the jury even where the duress defense is carefully circumscribed. The Government mistakenly claims that in *M'Carty* the Court rejected a claim of duress, noting that the defendant had remained with British troops for a period sufficiently lengthy that he might "easily have accomplished his escape," and that his intention could not "remain unexecuted for so long a period." It fails to point out that the quoted language appeared in the jury instruction. The case was submitted to the jury and M'Carty was acquitted.[27] See also *R.* v. *Hudson & Taylor, supra,* [1971] 2 Q.B. at 207.

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[26] Contrary to what might be inferred from the Government's citation form, *Respublica* v. *M'Carty* is a decision of the Supreme Court of Pennsylvania, not the federal Supreme Court.

[27] The rule that the Government professes to be a general limitation on the duress defense was developed and has traditionally

Whether or not these limitations were once viewed as "essential conditions" to cabin the defense and ensure that it was only available in truly coercive or "choice-of-evils" situations is beside the point. The unvarying trend, as exemplified by the Model Penal Code,[28] has been to relax the conditions for raising the defense and to enhance the role of the jury.

2. Duress in the escape context

Even if the "traditional limitations" on the duress or choice-of-evils defense were in full force and effect, the Government would not be content to have them applied in the prison escape context. It proposes a rule, based on its understanding of *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974),

been applied in treason cases. *D'Aquino* v. *United States*, 192 F.2d 338, 358 n. 11 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). Thus it is designed for precisely the opposite situation from the present one, *i.e.*, the defense is made unavailable to one who fails to escape. Some lower federal courts have applied a criteria of "escapability" as a prerequisite to raising the duress defense in certain contexts, not relevant here. *R.I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 177 F.2d 603 (1st Cir. 1949); *Shannon* v. *United States*, 76 F.2d 490, 493 (10th Cir. 1935). If *R.I. Recreation* states the law, then it should not be the law, as its shocking facts attest. Compare *Lynch* v. *D.P.P.*, *supra*. In any event, this limitation on the duress defense applies to a captor situation, and is inapposite here.

[28] See American Law Institute, Model Penal Code §§ 2.09 (Duress), 3.02 (Justification Generally: Choice-of-Evils) (Proposed Official Draft 1962).

that would impose even more rigid limits on the availability of the defense—constraints that are unique, that have no counterpart in defenses to much more serious crimes, and that would deprive the respondents in this case of having the jury consider their defense.

The ancient common law recognized the choice of evils defense to prison breach.[29] The Government concedes that the defense is available in spite of the historical reluctance of the courts to apply it in escape cases. Nevertheless, it expresses concern that the defense is particularly subject to abuse in the escape context and urges the Court to adopt the "conditions" set out in *People* v. *Lovercamp*, *supra*, including the dictum that "the prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat," as essential preconditions to raising the defense. The result of the mechanical application of this formulation is to deprive the defendant of jury consideration of his defense if one of the essential elements is missing. This position cannot be squared with *Lovercamp* itself or

[29] "In some cases it is lawful for the prisoner to break prison both at the common law, and notwithstanding this statute: as if the prison be set on fire, either by lightning or otherwise, unless it be by the privity of the prisoner, he may break prison for safeguard of his life. * * * But it must be inevitabilis necessitas." E. Coke, Second Institutes *590. See 1 M. Hale, Pleas of the Crown *611; 2 Bishop's New Criminal Law 628 (8th ed. 1892); *Baender* v. *Barnett*, 255 U.S. 224, 226 (1921).

the several influential cases which have applied it. The "return requirement" is the heart of the Government's case, but no persuasive reason is set forth to justify its substantial intrusion on the jury's function.

3. An absolute return requirement interferes with the fact-finding function of the jury and is unnecessary to protect legitimate societal interests.

In *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), the court held that a choice-of-evils defense was available to a defendant in an escape case. In doing so, the court sought to implement its belief that "[i]n a humane society some attention must be given to the individual dilemma." *Id.* 112. To accomplish this goal without endangering the legitimate interests of society, the court characterized the necessary inquiry as "looking to all the choices available to the defendant and then determining whether the act of escape was the only viable and reasonable choice available." *Id.* To facilitate implementation of the principle that the "defense of necessity to an escape charge is a viable defense" (*id.* 115), and "to insure that the rights and interests of society will not be impinged upon" (*id.* 112), the court announced five conditions that would govern the availability of the defense.[30] The court also made perfectly clear that

[30] The five conditions are:

"(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

"[w]hether any of the conditions requisite to this defense exist is a question of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances." *Id.* 116. In *Lovercamp* the defendants had been recaptured so soon after their escape that the court modified the fifth element to whether they *intended* to report to the authorities and held that "[w]hether that testimony is believable under the facts and circumstances of this case will be a question of fact addressed to the jury." *Id.* 116.

In view of the court's stated intention that the viability of the defense in any given case be a question of fact for the jury, it is ironic that *Lovercamp* is the theoretical base for the government's case. We believe it has fundamentally misread *Lovercamp*.[31] Subsequent cases have decisively rejected the interpretation of *Lovercamp* that the Government has advanced

"(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

"(3) There is no time or opportunity to resort to the courts;

"(4) There is no evidence of force or violence used towards prison personnel or other 'innocent' persons in the escape; and

"(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat." 43 Cal. App. 3d at 823, 118 Cal. Rptr. at 115.

[31] Contrary to the Government's representation, *Lovercamp* was not "the first appellate decision to analyze the competing

as an unwarranted interference with the fact-finding function of the jury.

In *People* v. *Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975), the Supreme Court of Michigan held that the defense of duress was a question for the jury. The defendant had been confronted in the lavatory by six unknown assailants who made homosexual demands of him. When he refused and attempted to leave the bathroom, he was beaten with a toilet bowl brush, had a knife waved in his face, was knocked down or fell and hit his face on a wash basin and was literally

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considerations and to find the defense available to an escape defendant" (Pet. Br. at 29). *Lovercamp* was the first appellate decision to apply the *necessity* theory but the Michigan Court of Appeals had already upheld the availability of the *duress* defense when *Lovercamp* was decided. *People* v. *Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974); *People* v. *Luther*, 53 Mich. App. 648, 219 N.W.2d 812 (1974). *Harmon* and *Luther* were subsequently upheld by the Michigan Supreme Court, as explained in the text.

Lovercamp adopted the court of appeals' holding in *Harmon* that a defense was available and declined to follow an earlier Michigan court of appeals case which had rejected the defense. *Lovercamp, supra*, 118 Cal. Rptr. at 114. *Harmon* imposed no preconditions on the availability of the defense. Rather, *Harmon* held that "To establish the defense of duress it is necessary that a defendant show that the violation of law for which he stands charged was necessitated by threatening conduct of another which resulted in defendant harboring a reasonable fear of imminent or immediate death or serious bodily harm." 220 N.W. 2d at 214.

chased off the grounds at about 10:30 p.m. He testified that he tried unsuccessfully to find the duty officer. He was apprehended on the highway a few miles from the camp at 6:30 the next morning.

The trial court gave a confusing instruction to the jury, in which it outlined the traditional criteria of duress but instructed also that it was not a defense to escaping prison that the defendant fled to avoid homosexual attacks by other prisoners. The defendant was convicted. The Michigan Court of Appeals reversed, and its judgment was upheld by the State Supreme Court, which held that a defendant successfully raises the defense of duress when he presents evidence from which a jury could conclude:

> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> "B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> "C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> "D) The defendant committed the act to avoid the threatened harm." 232 N.W.2d at 187.

In response to the state's argument that the court adopt the *Lovercamp* criteria as essential preconditions, the court held:

> "To the extent that competent evidence may be produced as to any of these conditions, it is rel-

evant to the claim of duress. As such, it should be submitted to the jury. For example, should defendant be retried, evidence on the question of whether he immediately reported once having attained a position of safety from the immediate threat would be admissible as bearing upon elements (C) and (D) of the defense." 232 N.W.2d at 187 (footnote omitted).

In a case decided the same day, *People* v. *Harmon*, 394 Mich. 625, 232 N.W.2d 187 (1975), the court held that the fact that the defendant did not leave the prison until about 24 hours after a confrontation with inmates seeking sexual favors "does not suffice to remove the defense of duress from the consideration of the jury." "[W]hat constitutes present, immediate and impending compulsion depends on the circumstances of each case." 232 N.W.2d at 188.

The Illinois Supreme Court has similarly rejected the contention that only a "limited" duress defense is available in prison escape cases. *People* v. *Unger*, 66 Ill. 2d 333, 5 Ill. Dec. 848, 362 N.E.2d 319 (1977). *Unger* contains a careful discussion of the underlying principles. The defendant had walked off an honor farm and was apprehended two days later. Prior to his transfer to the honor farm, he had been threatened by another inmate in an attempt to force the defendant to engage in homosexual acts. The defendant did not report the episode for fear of retaliation.

After his transfer to the honor farm, he was assaulted and sexually molested by three inmates. The

attack occurred on March 2, 1972. Between then and March 7 when he escaped, he received more threats, the last one on the day he escaped. He did not report the threats to the prison authorities. He testified that he had escaped to save his life and that he had planned to return once he found someone who could help him.

The judge instructed the jury that the reasons given for the escape were immaterial and were not to be given any consideration by them. The court also refused to give two instructions on duress and necessity. The Illinois Court of Appeals reversed, and the state supreme court upheld its judgment. The court reviewed the history of the defenses and determined that the necessity defense was appropriate in escape cases. An Illinois statute defined necessity as follows:

> "Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." Quoted at 362 N.E.2d at 322.

The court found that, even though the state's evidence cast doubt on the defendants' motives for escape and upon whether it was necessary, "the defendant was entitled to have the jury consider the defense on the basis of his testimony." 362 N.E.2d at 323.

The state urged the court to apply "a more stringent test" to prison escape cases based on *Lovercamp*. As in the instant case, the state argued that the defendant had not informed the authorities of his situation and had failed to report immediately after securing a position of safety. The court rejected the argument that the "existence of each condition is, as a matter of law, necessary to establish a meritorious necessity defense," 362 N.E.2d at 323, but agreed "with the State and with the court in *Lovercamp* that the above conditions are relevant factors to be used in assessing claims of necessity." *Id.* The Court said:

> "The preconditions set forth in *Lovercamp* are, in our view, matters which go to the weight and credibility of the defendant's testimony. The rule is well settled that a court will not weigh the evidence where the question is whether an instruction is justified. [Citation omitted.] The absence of one or more of the elements listed in Lovercamp would not necessarily mandate a finding that the defendant could not assert the defense of necessity.
>
> "By way of example, in the present case defendant did not report to the authorities immediately after securing his safety. In fact, defendant never voluntarily turned himself in to the proper officials. However, defendant testified that he intended to return to prison upon obtaining legal advice from an attorney and claimed that he was attempting to get money from friends to pay for such counsel. Regardless of our opinion as to the believability of defendant's tale,

> this testimony, if accepted by the jury, would negate any negative inference which would arise from defendant's failure to report to proper authorities after the escape. The absence of one of the *Lovercamp* preconditions does not alone disprove the claim of necessity and should not, therefore, automatically preclude an instruction on the defense. We therefore reject the contention that the availability of the necessity defense be expressly conditioned upon the elements set forth in *Lovercamp*." 362 N.E.2d at 323.

The Supreme Court of New Mexico has similarly rejected the argument, put forth by the state, that the *Lovercamp* standards are indispensable preconditions to the duress defense in escape cases. In *Esquibel* v. *State*, 91 N.M. 498, 576 P.2d 1129 (1978), the defendant alleged that he had suffered a prolonged history of beatings and serious threats by guards and prison personnel. The court canvassed the elements of duress as reflected in a statute, as well as state and federal cases, and concluded that it would be appropriate in escape cases. The court held:

> "The defense of duress is a question for the jury. *People* v. *Luther, supra.* A defendant successfully raises the defense of duress when he presents evidence, as here, from which a jury could conclude that he feared immediate great bodily harm to himself or another person if he did not commit the crime charged and that a reasonable person would have acted in the same way under the circumstances. The defendant thus having established a prima facie case of

> duress, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear." 576 P.2d at 1132.

With respect to the state's argument that *Lovercamp* stood for a more limited rule which the court should adopt, it said:

> "The preconditions set forth in *Lovercamp* are, in our view, matters which go to the weight and credibility of the testimony upon which the defendant bases his prima facie case. *People* v. *Unger*, 66 Ill.2d 333, 5 Ill.Dec. 848, 362 N.E.2d 319 (1977). To the extent that competent evidence may be produced as to any of these conditions, it is relevant to both the proof and disproof of the claim of defense. *People* v. *Luther*, *supra*. Such evidence is available to the prosecution in its task of overcoming the defendant's prima facie case of duress." 576 P.2d at 1132.

The cases stand for the plain proposition that even if the defendant's explanation seems improbable or implausible it is for the jury, and not the judge, to make the determination.

The Government dismisses these decisions by saying that the courts did not evaluate the return requirement in light of the continuing character of the escape offense (Pet. Br. 34 n.21). But these courts were fully apprised of the state's contention that a failure to return should permit the trial court to take the issue away from the jury, and refused to accept

it. As was stated in a different context, the government's position "at least makes for neatness" but "[t]he trouble about such neatness is that it may work intolerable injustice in individual cases." *Lynch* v. *Director of Public Prosecutions*, [1975] 1 A.C. 653, 707, [1975] 1 All E.R. 913, 948-49 (1975) (H.L.) (Lord Edmund-Davies). The stringent rule urged upon the Court has been rejected precisely because the courts have recognized the harshness and potential injustice that such a rule could work in individual cases. It is not difficult to imagine a situation where a mildly retarded prisoner is threatened with homosexual rape, and escapes. He might be incarcerated hundreds of miles from family and friends. Confused and panic-striken, he might try to make his way home to seek advice. If he later turns himself in or is captured before he gets home, under the rule urged by petitioner, he would be barred from raising the choice-of-evils defense.

A case in point is *Lovercamp* itself. Applying the Government's standard, if instead of being recaptured immediately, the young retarded woman had been at large for a few hours and then was captured or turned herself in, she would not have been able to raise the defense.[32] Rather than create a procrustean test that

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[32] The Government's rationale for the immediate return requirement—that the danger is averted as soon as the inmate is outside the prison—does not necessarily follow. At the very least, it is unreasonable to expect a fugitive to put himself back into a situation in which the threat of immediate harm would be real

admits of no flexibility, these courts chose to place their confidence in the jury to ferret out abuses of the defense when tested by our adversarial system.

The Government argues that its reading of *Lovercamp* has been widely accepted and cites several cases in support of this statement (Pet. Br. 30). A careful reading of these cases, however, demonstrates instead a most narrow and tenuous accord with petitioner's interpretation.[33]

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and the defendant would have no immediate source of assistance. The respondents' case is a prime example, for they had allegedly been abused not by other prisoners, but by the guards themselves. Where the chances are great that the accused would be returned to the same facility, a question of fact is raised as to whether the immediacy of the threatened harm has ceased.

For the difficulties of guarding, or being guarded, against even a known hazard on reconfinement, see *Palmigiano* v. *Garrahy*, 443 F. Supp. 956, 967 (D. R.I. 1977): "One inmate testified that, shortly after his entry into the [Rhode Island Adult Correctional Institutions] in 1973 when he was 18 years old, he was gang-raped in the shower room in Maximum. Released from prison soon thereafter, he was reincarcerated in May, 1976. Within a month, he was again viciously sexually assaulted in the shower room, this time while he was in protective custody in Medium. In December, 1976, while living in a different dormitory in Medium, he was again gang-raped. He suffered a nervous breakdown."

[33]In *U.S.* v. *Boomer*, 571 F.2d 543 (10th Cir. 1978), the issue of duress was given to the jury even though the court of appeals remarked that the facts and circumstances were such as to cast great doubt that the defendants had intended to turn themselves in if they cleared the prison wall. In *United States* v. *Bryan*, 591

A further justification offered by the Government in support of an absolute return requirement is that there are certain pragmatic problems endemic to the

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F.2d 1161 (5th Cir. 1979), the defendant had escaped from a hospital where he was in a position of safety. Aside from not meeting any of the *Lovercamp* criteria, arguably the basic requirement of the duress defense that the individual be in immediate danger of death or serious bodily harm was missing. Significantly, the court expressly distinguishes *United States* v. *Bailey* on its facts.

It would take an extravagant reading of *State* v. *Horn*, 58 Haw. 252, 566 P.2d 1378 (1977), to find support for the government's theory. The principal issue before the court in *Horn* was whether duress is ever a defense in an escape case. In holding that the defense was available, the court adopted "the rationale and the conditions imposed by *Lovercamp*" but modified it so that a specific threat of death or serious injury is not required. The court stressed that an accused is entitled to a jury determination of his guilt or innocence as long as there is some credible evidence to support the defense. The court specifically adopts *People* v. *Harmon*, *supra*, in holding that the defense should have been submitted to the jury. While the court noted that an escapee must report immediately to the proper authorities when he reaches a position of safety, it apparently saw this as a jury question as well. The opinion is not altogether clear as to how long the defendants were at large, stating only that the defendants were captured shortly after intentionally escaping from the state prison. 566 P.2d at 1380. On this record, the court reversed the judgment of conviction and remanded for a new trial.

State v. *Reese*, 272 N.W.2d 863 (Iowa 1978), while it adopts the petitioner's interpretation of *Lovercamp*, is hardly overwhelming support for the position. The majority rejects the traditional duress doctrine in favor of a special rule for escape cases.

duress defense in escape cases. A return requirement, the Government asserts, would make clear to prisoners, who as a class have already demonstrated a willingness to break the law, that the defense would be useless to those who would use it as a perpetual defense to an escape charge. Requiring the prisoner to return, it argues, would also confirm the bona fides of the defendant's motivation for departing from custody.

Two justices dissented, and a third took no part in the decision. The dissent reviews the two lines of cases pretaining to duress in escape cases and concludes that the difference between them is "one of degree." But the critical issue dividing the court is confidence in the jury system. Justice McCormick states in dissent:

> "Apart from whether the defense is to be meaningful, the issue is whether juries can be trusted to find the facts. The *Unger* rule is meaningful and is based on trust in the ability of juries to apply it. Our system depends on society's trust in juries, and history proves this trust is justified. See *Bearbower* v. *Merry*, 266 N.W.2d 128, 134 (Iowa 1978)." *Id.* 869-70.

Johnson v. *State*, 379 A.2d 1129 (Del. 1977) did not involve a threat of death or serious bodily injury: the defendant there based his defense on objectionable living conditions. The court simply states that the *Lovercamp* tests are examples of extreme situations not present in the case before the court. In *State* v. *Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975), the escaped prisoner had remained at large for two years, after escaping to seek treatment for a case of poison ivy. Apparently there was no justification offered, and on these facts the plea of necessity was properly rejected. Even under the traditional test the court would not have been required to submit the case to the jury.

It is not self-evident why the pragmatic problems the Government describes could not equally be served by a rule that makes failure to return a relevant consideration for the jury. A flexible rule would fully address the point, which we do not dispute, that failure to report to the authorities may reflect adversely on the bona fides of the accused's motivation. But for no adequate reason, the Government would turn the failure to return into a conclusive presumption that would withdraw the question of fact from the jury's consideration.

Nor is it apparent that an absolute return requirement would better discourage those prisoners intent on escaping than would a flexible rule.[34] The Government has not attempted to show that the incidence of

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[34] The Government suggests that a rash of escapes would likely ensue if the Court does not impose a return requirement as a necessary precondition to raising the defense. The same argument was made, unsuccessfully, to the Michigan Court of Appeals in *People* v. *Harmon*, 53 Mich. App. 482, 220 N.W.2d 212, 215 (1974), where the issue was whether the duress defense should be permitted at all in the escape context. The court said:

> "We do not consider this [a rash of escapes] to be the necessary result of our decision. First, it is to be remembered that simply because an escapee alleges that he escaped to avoid homosexual attacks will not suffice to prevent a conviction. The defense, as outlined above, must be established by competent evidence in a trial where the testimony of witnesses is subjected to the scrutiny of the fact-finder who, in the course of determining the true facts of the case, would properly consider the credibility of the various witnesses. It

escapes in states which take the latter approach has risen. The scant data that exists in the states that have adopted the position urged by respondents indicate that these decisions have had no impact on

is not our function in deciding this case to judge the veracity or claims of future prisoners who might maintain that their escape was necessitated by such indignities. The credibility to be accorded such tales lies solely within the province of the fact-finder and is to be determined within the facts of each case as it arises. Secondly, our decision may well produce a result entirely opposite to that feared by the *Noble* Court. [*People* v. *Noble*, 18 Mich. App. 300, 170 N.W.2d 916 (1969)] If the conditions of our penal institutions have reached the point where the only recourse to free one's self from unwanted personal attacks is to flee, then any improvements made in our prisons with respect to assuring the personal safety of the inmates could only serve to eliminate from the ranks of escapees those who do so solely in an effort to protect themselves. The result, therefore, might well be fewer prison escapes rather than more.

"Human nature being what it is, defendants who have escaped from prison for reasons unconnected with those presented here will undoubtedly argue that they did so because of homosexual attacks. These claims, however, will be judged within the framework of the fact-finding process were the traditional safeguards for determining the truth of a tale will be applied. To us this is extremely more desirable than relegating the actual victims of such attacks to years more of the same treatment where no workable safeguards are employed to protect their safety."

escape rates.[35] Even if the Government is right that some prisoners would take the availability of a duress defense into account before deciding whether to es-

[35] Data compiled by the Law Enforcement Assistance Administration, the Michigan Department of Corrections and the Illinois Department of Corrections indicates that in the states of Michigan and Illinois where courts have permitted juries to consider the duress defense to the crime of escape, the floodgates have not opened. *People* v. *Luther*, 394 Mich. 619, 232 N.W.2d 184 and *People* v. *Harmon*, 394 Mich. 625, 232 N.W.2d 187 were both decided in 1975. According to the LEAA and Michigan Corrections Department, there has been no significant increase in the number of escapes since these decisions were issued. LEAA data shows that in 1974, 78 per 1,000 inmates escaped; that in 1975, 73 inmates per 1,000 escaped; in 1976, 67 inmates per 1,000 escaped; and in 1977, 68 inmates per 1,000 escaped. (National Prisoner Statistics Bulletin—U.S. Dept. of Justice—LEAA—National Criminal Justice Information and Statistics Service). (The data includes "absconders from furlough" in the definition of escape as well as "breaches of security.") The statistics compiled by the Michigan Department of Corrections do not differ significantly from the LEAA. In 1974, 73 inmates per 1,000 escaped; in 1975, 65 inmates per 1,000 escaped; in 1976, 63 inmates per 1,000 escaped; and in 1977, 68 inmates per 1,000 escaped. Annual Reports-Michigan Department of Corrections. Likewise statistics gathered by the Illinois Department of Corrections also refute the Government's unfounded fear, *People* v. *Unger*, 66 Ill. 2d 333, 5 Ill. Dec. 848, 362 N.E.2d 319 (1977), was decided in 1977. Since then, there has been no statistical increase in escapes. In Illinois in 1975, there were three escapes per 1,000 inmates (twenty-two escapes out of an average prison population of approximately 7,236); in 1976, there were three escapes per 1,000 inmates (twenty-two escapes out of an average prison pop-

cape, its theory cannot withstand analysis. For even under its interpretation of *Lovercamp* there are some instances where a failure to return does not preclude jury consideration. In *Lovercamp* itself, the defendant was recaptured immediately upon gaining her freedom. Under the circumstances, the court held that it was for the jury to determine whether she intended to surrender had she reached a position of safety. A prisoner who included the availability of the duress defense in his calculation before escaping would at least know that, if he were immediately recaptured, the issue of whether he intended to return would be for the jury.

The Government's final articulated concern—that prisoners might plot together to "coerce" their fellow prisoners to escape or turn themselves in if arrest seems imminent and then raise the duress defense—gives little credit to the jury system. The reality is that, absent a compelling and well-substantiated

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ulation of 8,859); in 1977, there was one escape per 1,000 inmates (fourteen escapes out of an average prison population of approximately 10,221); in 1978 after the decision in *Unger*, there was still only one escape per 1,000 inmates (fourteen escapes out of an average prison population of 10,551); and in early 1979 there were zero escapes per 1,000 inmates (one escape for the first two months of 1979 out of a average prison population of approximately 10,382). (Illinois's statistics are substantially lower per 1,000 than Michigan's because they do not include absences from half-way houses, work release programs, and so forth.) All of these statistics are infirm in many ways typical of crime statistics, but they give no support to the Government's fears.

showing of abuse in a given case, a prolonged absence is likely to be viewed by the jury with a jaundiced eye. In the final analysis, "[i]t is exclusively the role of the jury, as the representative of the community, to judge the credibility of a defendant's story." Comment, From Duress to Intent: Shifting the Burden in Prison Escape Prosecutions, 127 U. Pa. L. Rev. 1142, 1170 (1979).

For all of these reasons, the Government's contention that failure to return to custody should be an absolute bar to jury consideration of a duress or choice-of-evils defense, based on its reading of *Lovercamp* and its justifications for applying that reading to federal law, should be rejected. The trial court in this case was in error to accept that argument, and the court of appeals correctly reversed the convictions.

B. Even if a return requirement is generally a precondition to a choice-of-evils or duress defense in escape cases, it cannot be applied to sustain respondents' convictions in this case

Whatever the appropriateness of the "return requirement" as a precondition to a choice-of-evils or duress defense in escape cases, the court of appeals decided that the return requirement could not justify the refusal of the trial judge to instruct on the choice of evils defense in this case. Following the lead of *United States* v. *Michelson*, 559 F.2d 567 (9th Cir. 1977), it found that the return requirement "is based

on the critical assumption that escape is a 'continuing' offense, *i.e.*, that one may commit the crime of escape, even if his original departure from custody was justified, by failing or refusing to *return* to custody once the justifying circumstance is no longer present." (Pet. App. 23a.) The court of appeals accepted, *arguendo*, that escape under federal law is indeed a "continuing offense,"[36] but it found that "this theory was not reflected in the indictment or in the trial court's charge to the jury." (Pet. App. 24a.) Both indictment and instruction referred to an alleged escape occurring on August 26, 1976. The trial court's instruction "rather than explaining a 'continuing offense' concept to the jury, emphasized the notion that the offense took place when the appellants left the jail on August 26." (Pet. App. 25a.)

The court of appeals held that the refusal to instruct the jury on the duress defense in these circumstances violated the respondent's right to a jury trial and required that their convictions be reversed:

> "In effect, the trial court denied appellants' right to have the jury consider a duress defense to the crime with which they had been charged (escaping on August 26) because the *court* found that they would in any event be guilty of an offense *under a theory (failure to return) that was never presented either to appellants or to the jury.* We cannot sanction such an obvious violation of appellants' constitutional right to jury trial." Pet. App. 25a-26a (emphasis in original).

[36] We provide an alternate justification for the court of appeals holding in Part I(C) *infra*, where we show that the court of appeals' assumption that escape under 18 U.S.C. § 751(a) is a "continuing offense" should be rejected.

Moreover, on appeal the respondents "were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). *When the jury convicted the respondents, it could only have been for the initial departure—not their continuing absence.* Respondents' convictions cannot be sustained on a "continuing absence" theory, of which they had no notice, and for which they were not convicted. *Presnell* v. *Georgia*, 439 U.S. 14 (1978).

In *Presnell*, the Court overturned three death sentences that had been imposed on the defendant after he had been convicted of three capital offenses—rape, kidnapping with bodily injury, and murder with malice aforethought. Under Georgia law, the death penalty could be imposed if the capital offense had been committed while the offender was engaged in another capital felony. Forcible rape was a capital felony, but statutory rape was not. Because there was no way of knowing from the verdict rendered whether the jury had convicted the defendant for forcible rape, the state supreme court had overturned two of the death sentences on the ground that the rape could not be assumed to involve the element of bodily harm.

The third death sentence rested on the murder conviction but could only be imposed if the offense had been "committed while the petitioner was engaged in the commission of 'kidnapping with bodily injury, aggravated sodomy.' " The state supreme court had upheld the death penalty "on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm * * *." 439 U.S. at 15-16.

In reversing, this Court pointed out that "petitioner had no notice, either in the indictment, in the instructions to the jury, or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping." 439 U.S. at 16 n.3. This theory, therefore, could not be used by the appellate courts to sustain the conviction. By the same token, respondents here could not know that the Government would rely on the notion of escape as a continuing offense to convict them or to sustain their convictions on appeal.

This Court has recently said:

> "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Presnell* v. *Georgia*, [439 U.S. 14]. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice

> and a meaningful opportunity to defend." *Jackson* v. *Virginia*, 443 U.S. ____, 47 U.S.L.W. 4883, 4885 (June 28, 1979).

The Government's arguments in defense of the trial court's ruling fly directly in the face of these principles.[37]

It is not a sufficient response to say that the offense of escape includes failure to return and that it was unnecessary either to charge it in the indictment or to instruct the jury as to this theory. (Pet. Br. 48-49.) It is well established that an indictment is not sufficient if it states the offense in generic terms. *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876). "A

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[37] The Government concedes that "it is both futile and inhumane to insist that an escaped prisoner surrender himself at once to a facility where genuinely dangerous conditions persist merely in order to preserve a defense of duress to the escape," (Pet. Br. 44), and that, accordingly, the requirement is not "failure to return" but "failure to report." (The looser requirement, see Pet. Br. 45, may be intended to avoid self-incrimination issues.) The trial court embraced a similar notion at times (App. 201, 219-20; Tr. 725, 778-79), though not in his statement in the final instructions (App. 225; Tr. 807). Thus, even assuming that the continuing offense theory had been explained properly to the jury, the respondents were entitled to an instruction on what sort of reporting was necessary or on possible justifications for failure to report. Bailey's attorney explicitly said to the court, "[A] duress instruction is appropriate as to my client, because the testimony has shown that there was and it can be interpreted by the jury, that there was a continuing duress on the part of my client." (App. 214; Tr. 771.)

cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell* v. *United States*, 369 U.S. 749, 766 (1962).[38] These principles are equally applicable where a defendant is refused the opportunity to raise a defense to a crime which is charged because that defense would not be available on a different theory of which he is given no notice.[39]

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[38] See also *United States* v. *Carll*, 105 U.S. 611, 612 (1881) ("In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished * * *"); *United States* v. *Hess*, 124 U.S. 483, 487 (1888) ("Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.").

[39] The Government argues that, if the court of appeals is correct, in the future prosecutors will have to put in the indictment that the defendant was guilty of escape by continued absence and implies that this would work some hardship on the Government (Pet. Br. 49 n.32). When the Government goes before the grand jury, it presumably knows whether the defendant is still at large, or if already in custody, how long he was gone. It would be no hardship to put these facts before the grand jury and include it in the indictment. The defendant would then be specifically apprised of what charge he must defend against.

In support of its claim that continuing absence need not be separately alleged or explained to the jury, the Government relies on *United States* v. *Michelson*, 559 F.2d 567 (9th Cir. 1977) and other lower federal court decisions (Pet. Br. 49). *Michelson* does not reveal how the indictment was framed or whether the jury was instructed on the "continuing absence" theory of escape. This specific issue was simply not raised. It is significant, however, that *Michelson* cites with approval *United States* v. *Chapman*, 455 F.2d 746 (5th Cir. 1972), where the jury was instructed that a voluntary failure to return to custody would be proof of one of the elements of the offense.[40] The issue addressed in the cases cited by the Government is solely whether, under § 751(a), the necessary intent could be formulated after the initial departure. See, *e.g.*,

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[40] Chapman in effect was seeking a directed verdict of acquittal on the ground that he had been compelled to leave the prison by other inmates and did not decide to flee until later. The court held that late formation of intent could still constitute an offense under § 751(a). The jury was instructed that, if after being forced to leave custody a prisoner "on his own volition" decided to remain at large, this would constitute the crime of escape. 455 F.2d at 749. The opinion does not suggest that Chapman's evidence that he remained at large because of fear of great bodily harm from Escambia County deputy sheriffs and that he was on his way to surrender himself in Atlanta could not be considered by the jury in determining whether he voluntarily failed to return.

United States v. *Woodring*, 464 F.2d 1248 (10th Cir. 1972); *Chandler* v. *United States*, 378 F.2d 906 (9th Cir. 1967).

By parsing the words of the indictment and the jury instructions, the Government contends that the trial court in fact informed the jury as to the continuing nature of the offense of escape. (Pet. Br. 49.) While the Government contends that the words "flee" and "absent" conveyed to the jury that the offense was a continuing one (Pet. Br. 49), the common meaning of these words is to "leave" or "depart," not to "fail to return" thereafter. Juries cannot be expected to be familiar with the nuances of such terms when used in other statutes such as 18 U.S.C. § 3290 (cited, *id.*). The jury would have had to have been clairvoyant to have understood the judge's charge in the way that the Government would have this Court read it. A fair reading of the court's instructions shows that the continuing nature of the offense was simply not considered. The Government's approach, if accepted, would enable the "conviction to rest on one point and the affirmance of the conviction to rest on another." *Russell* v. *United States, supra*, 369 U.S. at 766.

The unfairness to respondents is dramatized by the Government's attempt to shift to them the blame for the narrowness of the instructions: it contends that the respondents never asked the court to inform the jury of the continuing offense aspect of the case and supports its charge by pointing out that the proposed

duress instruction focussed on the initial departure from custody. (Pet. Br. 50.) All the arguments before the trial judge had been in terms of the *Lovercamp* preconditions (if such they were) for presenting a defense of duress. If the Government had believed at trial that it was charging escape as a continuing offense, that fact would have emerged in the course of the arguments before the trial judge, and the Government, not the respondents, would have requested different instructions on the crime that was charged.[41]

The Government also faults the respondents for not producing more evidence relating to their failure to return. (Pet. Br. 50.) In fact, all of the respondents

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[41] *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), cited by the Government, is inapposite. In *Henderson*, no instruction on causation was requested at all by the defendant. Under the circumstances, the Court placed a very heavy burden on the defendant to demonstrate prejudice. In the instant case, respondents sought an instruction on duress that was fully consistent with the theory of the prosecution's case, as they understood it.

The Government is also mistaken when it refers to "the court of appeals' 'two crime' theory." (Pet. Br. 50.) The court did not say that escape as a continuing offense was a separate crime, but only that the continued offense theory must be explained in the indictment and in the jury instruction. The court did not address whether escape and continued absence are one offense or two. Respondent Walker's contention in the court of appeals that § 751(a) creates only one crime (see Pet. Br. 50 n.33), is fully consistent with the court of appeals' treatment of the issue. In the passage quoted by the Government, he was simply arguing against escape as a continuing offense (see Part I(C) *infra*).

introduced, or in the case of Cogdell, proffered evidence explaining their actions after escape. Bailey testified that he had been in fear for his life and that if he turned himself in he would still have been under the threat of death. He also knew that, after his escape, the FBI wanted to kill him, and that the FBI had told his people that they were going to shoot him. He testified that *he did have some people call the officials at the jail on several occasions;* this was never rebutted by the prosecution. He understood that, if he went back, he would have been returned to the Northeast One section of the New Detention Center and that the guards would have been the same ones who were there before he left.

Walker testified that he had contacted the FBI on no less than three occasions. According to his testimony, he had learned that the FBI had said that, if they found him, they would kill him (App. 195; Tr. 710). He was also concerned that if he surrendered he would be sent back to the D.C. Jail, where he would be subjected to the same conditions he had just left (App. 196, 198; Tr. 712, 719). His contacts with the FBI were to gain assurances that he would not be harmed and that he would not have to go back to the D.C. Jail (*id.*). While the FBI agreed that he would not be harmed by its agents if he turned himself in, it would give no assurance that he would not be returned to the New Detention facility (App. 200; Tr. 722).

Cooley did not personally call the authorities because he did not know who to call and because he feared for his life (App. 119; Tr. 408). He thought he would be shot when they came to get him (*id.*). Nevertheless, he testified that when he got home his people unsuccessfully attempted to get in touch with the authorities (*id.*).

Cogdell, while he did not testify, made a proffer that the duress "was a continuing process prior to my leaving, during, and also after I returned to the District of Columbia Jail." (App. 230; Tr. 13.) He told the court that he might be able to show that he wrote letters but the court ruled that, "If you can't meet the fifth [*Lovercamp* condition] you can't eat." *Id.* (*sic*).

"It is rightfully the province of the jury as the trier of fact, and not the trial judge, to consider whether there were circumstances justifying the defendants' failure to return." Comment, 127 U. Pa. L. Rev., *supra*, at 1147-48. Furthermore, at a new trial respondents will have the opportunity to explain further their failure to return and additional witnesses may be located.[42]

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[42] For example, Bailey testified that he had had "jail officials" called. (App. 175; Tr. 587.) Late in the trial, Bailey's attorney advised the court that he had attempted to locate witnesses who would corroborate Bailey's assertion "that he made some type of contact with the FBI." (Tr. 767; *sic.*) He had been unsuccessful in reaching Bailey's mother. He did speak, over the telephone, with one Jean Gore and was of the impression that she would

Respondents had the right to be informed in advance, and to have the jury informed, as to the Government's theory of the crime. They had the right to make a defense to the crime with which they were charged. They have the further right to have the validity of their convictions reviewed on the same theory upon which the jury convicted them. For all of these reasons, the judgment of the court of appeals must be affirmed.

C. Failure to return to custody after an initial departure is not a violation of the federal escape statute

The court of appeals correctly concluded that the trial court's refusal to instruct on the defense of duress or choice of evils had the effect of convicting respondents of escape under a theory—failure to return to custody—that was never reflected in the indictment or presented to the jury, and it reversed the

not support Bailey's testimony on this point. He had asked her to come to the courthouse but she did not appear. (Tr. 767-768.)

Thus, Bailey's mother, who might have provided corroboration, was never located. Jean Gore, who was only interviewed over the telephone, may have been confused by the fact that she was apparently asked about her efforts to contact the FBI on Bailey's behalf when in fact Bailey had testified that he had had "jail officials" called. It should further be noted that Bailey's counsel was appointed only shortly before the trial (Pretrial Tr. at 4-5) and understandably may not have had the opportunity to interview all potential witnesses prior to trial.

convictions for that reason (Pet. App. 25a-26a). We have defended the approach of the court of appeals in Part B above. It is an alternative ground for affirming the judgment of the court of appeals that the theory of escape as encompassing failure to return to custody is an unwarranted and improper expansion of 18 U.S.C. § 751(a). Respondents' conduct in failing to return was unlawful only if Congress made it so—that is, only if § 751(a) makes escape a continuing offense, rather than one that is accomplished at a single point in time, or in a single, limited period of time.[43] An examination of the common understanding of the crime of escape at the time of enactment of the federal escape statute, and this Court's decisions on when it is appropriate to construe a statute as creating a continuing offense, makes clear that escape is not a continuing offense and that the district court accordingly had no power to penalize respondents for not returning.

1. The offense of "escape" was not commonly known as a continuing offense at the time of the enactment of the federal escape statute

When the legislature enacts a criminal statute prohibiting conduct in words that already have legal significance, the words retain that definition unless there

[43] See *Sanabria* v. *United States*, 437 U.S. 54, 69 (1978); *Ex Parte United States*, 242 U.S. 27, 43, 52 (1916); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *cf. Easter* v. *District of Columbia*, 124 U.S. App. D.C. 33, 361 F.2d 50, 53 (1966).

is clear evidence of a contrary legislative intent. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Thus, because 18 U.S.C. § 751(a) nowhere defines the term "escape," the word is presumed to outlaw no more conduct than did its common law and statutory antecedents.

No federal statute prohibiting escape existed before 1930 when Congress passed an act for the reorganization of the administration of federal prisons and related purposes. Act of May 14, 1930, c. 274, 46 Stat. 326. Section 9 of this act prohibited escapes and attempted escapes while serving a federal criminal sentence.[44] See *United States* v. *Brown*, 333 U.S. 18, 21 (1948) (noting common law origins of offense). An examination of court decisions prior to 1930 indicates

[44] Prior to the Act of May 14, 1930, there had been federal statutes relating to escape, but they did not prohibit the act of escape itself. See Act of June 21, 1860, c. 164, 12 Stat. 69 (misdemeanor punishable by two years or $2000 for an officer to "voluntarily suffer" a federal prisoner to escape); Rev. Stat. § 5409 (to same effect); Act of March 4, 1909, c. 321, § 138, 35 Stat. 1113 (to same effect); *id.*, § 141, 35 Stat. 1114 (misdemeanor to "directly or indirectly, aid, abet, or assist any person to escape" from the custody of an officer holding him in federal custody).

After enactment of the Act of May 14, 1930, Congress made escape from two specific institutions a crime in another statute, Act of May 27, 1930, c. 339, § 9, 46 Stat. 390. The Act of May 14, 1930, was amended by the Act of August 3, 1935, c. 432, 49 Stat. 513, to cover persons escaping from custody prior to conviction. In the criminal code codification of 1948, the Act of May 14, 1930, as amended, 18 U.S.C. § 753h (1940), and the Act of

that the offense of escape was thought to cover only the actual departure from lawful confinement, and not cover the escapers' subsequent decision to remain at large. The states outlawed only "[t]he physical act" which was "the departure of the prisoner." See R. Perkins, Criminal Law 504 (2d ed. 1969).

Over the years prior to the enactment of the federal escape statute, state courts called upon to define the offense of escape repeatedly made reference only to the prisoner's actual departure from lawful custody. In 1890, the Supreme Court of North Carolina recited the most common definition when it held that an escape occurs " 'when one who is arrested gains his liberty before he is delivered in due course of law.' " *State* v. *Ritchie*, 107 N.C. 857, 12 S.E. 251 (1890) (quoting 1 Russell on Crimes 467). Similar definitions appeared in many other pre-1930 cases. See, *e.g.*, *Houpt* v. *State*, 100 Ark 409, 140 S.W. 294, 296 (1911) ("[w]hen the prisoner goes away from his place of lawful custody"); *Whitaker* v. *Commonwealth*, 188 Ky. 95, 221 S.W. 215, 216 (1920) ("departure by a prisoner from lawful custody before his discharge by

May 27, 1930, 18 U.S.C. § 909 (1940), were superseded by 18 U.S.C. § 751, with that provision taking over the substance of 18 U.S.C. § 753h (1940) with minor amendments. Act of June 25, 1948, c. 645, 62 Stat. 683. See H.R. Rep. No. 304, 80th Cong., 1st Sess. at A67 (April 24, 1947).

Section 751, now 18 U.S.C. § 751(a) (1976), has been the subject of minor amendments since 1948.

process of law"); *State* v. *Sutton*, 170 Ind. 473, 84 N.E. 824, 826 (1908) ("where one who is under arrest gains his liberty before he is delivered by the course of the law"); *Hefler* v. *Hunt*, 120 Me. 10, 112 A. 675, 677 (1921) ("departure of a prisoner from custody before he is discharged by due process of law"). See generally Annot., 10 A.L.R. 148 (1921) (citing cases). All of these definitions focus on the physical act of departing custody in defining an escape. Such a definition is inconsistent with the idea that a fugitive is committing the same crime as long as he remains at large.

Two courts used similar definitions to hold that a prisoner who left his place of confinement but did not get beyond the prison grounds was guilty of an escape, and not merely an attempted escape, because he had unlawfully left the limits of his confinement, and the crime was complete. See *People* v. *Quijada*, 53 Cal. App. 39, 199 P. 854 (1921) ("common legal definition * * * means a violation * * * of some lawful custody"; when prisoner went beyond prescribed limits, he "violated his lawful custody"); *State* v. *Cahill*, 196 Iowa 486, 194 N.W. 191, 193 (1923) ("escape was complete * * * when he opened the unlocked door of the cell and went, as he claimed to have done, to another part of the prison").

It becomes even more clear that escape was not considered a continuing offense before 1930 from an examination of the cases dealing with charges of aiding an escape. At least two courts—one federal—held

that in order to be convicted of aiding a prisoner to escape, the alleged accomplice must give aid before the prisoner is out of custody, because after that time the escape is complete.[45] In *Orth* v. *United States*, 252 F. 566 (4th Cir. 1918), the defendant was charged with aiding a prisoner who had escaped from the federal penitentiary in Atlanta, Ga., pursuant to the Act of March 4, 1909, c. 321, § 141, 35 Stat. 1114 (see note 44 *supra*). The defendant apparently had concealed and assisted the prisoner when he appeared over three weeks later in Charleston, S.C. He moved for a directed verdict of acquittal, the motion was denied, and he was convicted. But the circuit court of appeals reversed:

> "The evidence furnished no foundation for conviction of the charge of aiding [the fugitive] to escape from lawful custody. *When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete.* After that aid to the fugitive is no longer aiding his escape. * * * The evidence is clear that [the fugitive] had escaped altogether from the Atlanta penitentiary, and was at large entirely free from custody for some days before the defendant * * * rendered him assistance in Charleston." 252 F. at 568 (citations omitted, emphasis added).

Thus the circuit court clearly viewed the escape as having been completed once the offender was free.

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[45] This did not mean that the accomplice necessarily went free, because he could still be convicted on charges of harboring a fugitive.

The Georgia Court of Appeals reached a similar conclusion in *Harvey* v. *State*, 8 Ga. App. 660, 70 S.E. 141 (1911), when it held: "To authorize the conviction of one charged with aiding a prisoner to escape, * * * the evidence must establish the fact that the prisoner *was in the act of escaping.*" *Id.* (emphasis added).

All in all, we have not found a single state case prior to 1930 in which an appellate court approved a conviction under a general escape statute based on the failure to return subsequent to an initial departure from custody.[46] The evidence thus indicates that the

[46] One case apparently to the contrary in fact supports the general proposition. In *Smith* v. *State*, 6 Ga. App. 297, 68 S.E. 1071 (1910), the court affirmed a conviction for aiding and abetting an escape based on conduct subsequent to an escape. The fugitive had escaped from a chain gang. "Later in the day," and still in shackles, the fugitive met the defendant, who furnished an ax with which the fugitive cut the shackles. The court stated the general rule as to the completion of escapes as follows: "As to escapes from the personal custody of officers, the offense is complete whenever the prisoner gets entirely away. So long as the pursuit is in progress and the fleeing prisoner is in sight of the officers or posse, the escape is not complete; but when he outruns them, or successfully eludes them and gets away, the escape is complete, and thereafter the offense of aiding an escape cannot attach to that particular transaction." 68 S.E. at 1072. The court concluded, however, that the rule as to escaping *from a chain gang* was different, partly because of the nature of the constructive confinement, and partly because the statutory language making escape from a chain gang an offense required that

common understanding of the crime of escape in 1930, when Congress enacted the federal escape statute, was that escape was not a continuing offense.

2. *The offense of "escape" under 18 U.S.C. § 751 is not a continuing offense under accepted canons of statutory construction*

Criminal statutes are subject to strict standards of construction against the government. *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); 3 Sutherland's Statutory Construction § 59.03 (4th ed. C. Sands, 1973). As a corollary this Court has announced a strong presumption against construing a statute as creating a "continuing offense." It said in *Toussie* v. *United States*, 397 U.S. 112, 115 (1970), that "the doctrine of continuing offenses should be applied in only limited circumstances." An examination of *Toussie* and of this Court's other decisions construing the continuing offense doctrine makes clear that the instant case does not fit any of those "limited circumstances," and that escape under 18 U.S.C. § 751(a) should therefore not be considered a continuing offense.

Toussie involved a prosecution under Section 3 of the Universal Military Training and Service Act, 65

the fugitive "be thereafter retaken" and thus "seems to make the retaking of the prisoner a part of the crime." *Id.* The court concluded that the legislature had intended to "make the crime of escaping from a chain gang a continuous act, never finally completed * * * until the time of recapture." *Id.*

Stat. 76, for failure to register for the the draft. Regulations promulgated under the Act required all male citizens to register within five days of their eighteenth birthday. Toussie was indicted nearly eight years after he turned eighteen. The statute of limitations applicable to such prosecutions was five years. The government contended that the duty to register continued until age 26—the upper age limit in the statute creating the duty to register—and the defendant contended that the statute of limitations began to run five days after the eighteenth birthday. Thus the Court was faced with an explicit question as to whether failure to register constituted a continuing offense.

The Court pointed out that "the doctrine of continuing offenses should be applied in only limited circumstances," and held that a given offense should not be construed as a continuing one "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." 397 U.S. at 115. Examining the statute and the legislative history in the light of these principles, the Court held that failure to register is not a continuing offense because the Act required a man to "register at a particular time" so that "his failure to do so at that time is a single offense." *Id.* at 119.

By contrast, in the cases in which this Court has held offenses to be continuing ones, the evidence of

Congressional intent has been so strong as to make the conclusions virtually self-reliant.

In *United States* v. *Cores,* 356 U.S. 405 (1958), the question was whether 8 U.S.C. § 1282(c), which punishes "[a]ny alien crewman who willfully remains in the United States in excess of the number of days allowed" in his conditional landing permit, created a continuing offense. The Court held that it did, based on the statutory language that clearly "proscribed * * * the affirmative act of willfully remaining." 356 U.S. at 408. Thus the statute in question by its terms made the offense a continuing one, since the act of "remaining" continues until the offender leaves. This is unlike the situation in *Toussie,* for example, where the statute by its terms created a "duty * * * to present [one's self] for and submit to registration." That act could only be performed during a limited statutorily prescribed period. See 397 U.S. at 113.

When the Court held in 1910 that under proper circumstances the crime of conspiracy could be a continuing offense, *United States* v. *Kissell,* 218 U.S. 601 (1910), Justice Holmes observed that "the mere continuance of the result of a crime does not continue the crime," citing *United States* v. *Irvine,* 98 U.S. 450, 451-52 (1878). He concluded, however, that it would be "a perversion of natural thought and of natural language" for the Court to conclude other than that a conspiracy could continue in time. 218 U.S. at 607. *Kissel* involved antitrust charges against several sugar refining companies, and the Court pointed out that

a conspiracy in restraint of trade "continues up to the time of abandonment or success." *Id.* at 608. So, again, it was clear from the nature of the offense that it was a continuing one.

In *In re Snow*, 120 U.S. 274 (1887), the Court held that the offense of cohabitation with more than one woman was a continuing offense: "It is, inherently, a continuous offense, having duration; and not an offense consisting of an isolated act." *Id.* at 281. The crime with which the defendant was charged was cohabitation, which would appear, as a common-sense notion, to be repeated as long as the defendant is cohabiting; he was not charged with the act of marrying more than one woman, which arguably would not have been a continuing offense. The indictment, moreover, expressly charged the defendant with "continuously" cohabiting with more than one woman. *Id.*

All of these decisions make clear that the Court is extremely reluctant to hold any offense to be a continuing one, absent powerful evidence that Congress intended it to be so and worded the statute accordingly. The statute speaks only of "escape from custody," words that, read most naturally, refer only to the act of departing from custody. It does not mention or allude to the decision to remain at large thereafter.[47]

[47] In this respect, it is more like *Toussie*, which involved a statute that created a duty to register at a particular time, but did not mention or further penalize continuing failure to register after the time had lapsed, than it is like *Cores*, in which the statute by its terms penalized "remaining" after a permit had expired, or like *Snow*, in which the offense of cohabitation by its very definition is something more than an isolated act.

Furthermore, even if there is a question as to whether the offense is a continuing one, this Court has a "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." *Dunn* v. *United States*, 60 L. Ed. 2d 743, 754 (June 4, 1979). "This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. * * * Thus, to ensure that the legislature speaks with special clarity when marking the boundaries of criminal conduct, the courts must decline to impose punishment for actions that are not ' "plainly and unmistakably" ' proscribed." *Id.* (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917); other citations omitted); see *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (same); *United States* v. *Universal Corp.*, 344 U.S. 218, 221-22 (1952) ("when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress

should have spoken in language that is clear and definite.") If this established "rule of lenity" is applied to 18 U.S.C. § 751(a), the only proper conclusion is that a prisoner can be punished only for the act of departing from custody.

The crime of escape has repeatedly been defined simply as an unauthorized departure from custody.[48] The widespread understanding of the offense when Congress enacted the first federal escape statute in 1930 was that the crime was commited by departing from custody, not by remaining absent thereafter. Nothing in the sparse legislative history of the 1930 Act, or any of the subsequent provisions, indicates that Congress ever had a different understanding of "escape."[49] Respondents committed the crime of escape under § 751(a), if at all, when they left the jail on the morning of August 26, 1976. The statute does not by its terms authorize the punishment for any other

[48] See pp. 82-88, *supra*.

[49] Congress has found it necessary to refine the definition of the crime of escape in another context. In the Act of September 10, 1965, Pub. L. 80-176, § 1, 79 Stat. 674, Congress authorized the Attorney General to "extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust," by authorizing him, under prescribed conditions, to visit dying relatives, attend funerals, obtain medical services not otherwise available, contact prospective employers and so forth. The prisoner could be authorized, in addition, to take part in work release programs. See 18 U.S.C. § 4082(c). To ensure that individuals violating the

act, and in the light of the above cases, should not be construed to do so.

3. Federal cases stating that escape under § 751(a) is a continuing offense should not be followed

According to the Government, "The courts are in agreement * * * that escape under 18 U.S.C. 751(a) is a continuing offense and that, even though an inmate's initial flight from prison may have been excusable, his continued absence from custody is itself sufficient to constitute the crime." (Pet. Br. 32.) The Government cites seven cases for this proposition.[50]

terms of their furlough could be prosecuted for escape, 18 U.S.C. § 4082(d) provides specifically:

> "The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title [which includes § 751]."

We note, in addition, that the Model Penal Code chose specific language in its definition of escape: "unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period." American Law Institute, Model Penal Code § 242.6 (Proposed Official Draft, 1962). See also § 208.33 (Tentative Draft No. 8, 1958).

[50] *Chandler* v. *United States*, 378 F.2d 906 (9th Cir. 1967); *United States* v. *Coggins*, 398 F.2d 668 (4th Cir. 1968); *United States* v. *Chapman*, 455 F.2d 746 (5th Cir. 1972); *United States* v. *Woodring*, 464 F.2d 1248, 1250 (10th Cir. 1972); *United States*

This array of authority, however, includes a number of distinguishable or irrelevant cases and does not include a single discussion of the background of the federal escape statute or of the considerable body of Supreme Court law on continuing offenses.[51] We believe, accordingly, that it is entitled to little weight in this Court.

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v. *Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976); *United States* v. *Cluck*, 542 F.2d 728, 732 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976); *United States* v. *Michelson*, 559 F.2d 567 (9th Cir. 1977).

[51] The earliest of the cases, *Chandler* v. *United States*, 378 F.2d 906 (9th Cir. 1967), is the ultimate authority on which the others rely. The main issue in that case was not the continuing offense point at all, but whether the trial court erred in permitting the prosecution to introduce evidence on the question of whether the dump truck in which the defendants were riding at the time of their arrest was stolen. *Id.* at 907. The court's statement that intent to escape could be formed subsequent to a departure from custody was made without any analysis whatsoever and without any citation to authority whatsoever. See *id.* at 908. In particular, the *Chandler* court did not discuss any of this Court's cases on the continuing offense doctrine.

United States v. *Chapman*, 455 F.2d 746 (5th Cir. 1972), concluded that an individual who had departed the grounds of the prison was still in custody for the purposes of a charge of escape. *Id.* at 749-50. The *Chapman* court, like the *Chandler* court, failed to cite a single case in support of its conclusion.

In *United States* v. *Cluck*, 542 F.2d 728 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976), the court again provided no analysis in support of its statement (a brief one in a long opinion devoted to other issues) that "it is settled" that the requisite intent may be formed subsequent to actual departure from custody, and it did

For all of these reasons, respondents contend that escape is not a "continuing offense," and that the

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not cite any of this Court's decisions construing the continuing offense doctrine. Of the four cases it did cite, two of them were *Chapman* and *Chandler*. The other two, *United States* v. *Woodring*, 464 F.2d 1248 (10th Cir. 1972), and *United States* v. *Coggins*, 398 F.2d 668 (4th Cir. 1968), are off point. *Coggins* dealt with an inmate on furlough, hence his prosecution was pursuant to the differently worded 18 U.S.C. § 4082 (d), discussed in note 49 *supra*, and the only issue was the willfulness of his conduct. In *Woodring*, defendant was at an Honor Farm, so the prosecution also may have been pursuant to 18 U.S.C. § 4082(d); there too, the issue was the willfulness of the failure to return. See also *United States* v. *Joiner*, 496 F.2d 1314 (5th Cir. 1974), cited by the court of appeals (Pet. App. 10a n.17), another case of an inmate failing to return from furlough, where the issue was willfulness.

Another case cited by the Government, *United States* v. *Spletzer*, 535 F.2d 950 (5th Cir. 1976), also appears to be a § 4082(d) case. It was won by the defendant, when the court ruled that the Government had not proved specific intent (held to be the law of the case because of the instructions). The court examined evidence of intent for a period of less than 24 hours after defendant was due to return.

United States v. *Michelson*, 559 F.2d 567 (9th Cir. 1977), like *Cluck*, simply relies on *Chandler*, *Chapman*, and *Woodring*, with no discussion of this Court's cases on the continuing offense doctrine. *United States* v. *Bryan*, 591 F.2d 1161 (5th Cir. 1979), briefly relies on *Michelson* for the appropriateness of denying a duress instruction because of failure to return.

Another recent case, *United States* v. *Boomer*, 571 F.2d 543 (10th Cir. 1978), is a case of attempted escape.

trial court's refusal to instruct on the duress or choice-of-evils defense because respondents did not return to custody was erroneous because the failure to return had not been made criminal by Congress.[52]

D. The question of the immediacy of the harm is not properly before the court but, assuming the court finds that it is, the record contains sufficient evidence of threats of immediate harm to create a question of fact for the jury

The Government argues that there is insufficient evidence that the threat of harm was imminent at the time respondents escaped and that this should, as a matter of law, preclude them from raising the choice-of-evils defense (Pet. Br. 35-42). As the Government itself points out (Pet. Br. 37 n.25), however, there is substantial difficulty in advancing this argument in this forum. It is perfectly clear that the trial judge was prepared to give the instruction on duress but for the failure of the defendants to return to custody. (App. 219-220; Tr. 778-79.) The Government did not brief this issue in the court of appeals or in its petition for rehearing and suggestion for rehearing *en banc*. The issue arises, if at all, only because the dissent argued that the immediacy requirement had not been

[52] This does not mean that evidence of a failure to return is irrelevant to a defendant's state of mind at the time of an escape or to whether a genuine choice of evils precipitated his departure. But these are questions for the jury.

met (Pet. App. 63a-64a). The majority felt compelled to respond to this in a footnote (Pet. App. 21a n.39). While stressing that the trial court was clearly correct, the court of appeals noted in passing that an inflexible immediacy requirement is particularly inappropriate for escape cases where the opportunity to escape may not coincide in time with the latest threat or attack.

The Government admits that its "principal focus" in opposing the duress instruction was the failure to return. (Pet. Br. 37 n.25.) In fact, it was the only focus. The Government's failure to preserve this issue should prevent it from raising it now. In any event, it is apparent that the court of appeals gave the issue only cursory attention. Under the circumstances it would be a departure from normal appellate procedure for this Court to embark on a weighing of the evidence to determine, in the first instance, whether sufficient evidence of immediacy was introduced to present a question of fact for the jury.

Assuming the issue is properly before the Court, it is clear that the immediacy of the threat cannot be disposed of as a matter of law. In a nutshell, the Government's argument appears to be that, unless the prisoner's "back is to the wall," the defense is unavailable. This is contrary to common sense and to the better reasoned American and English authorities.

What constitutes present, immediate and impending compulsion depends upon the circumstances of each case. *People* v. *Harmon*, 394 Mich. 625, 232 N.W.2d 187, 188 (1975) (escape 24 hours after confrontation); *People* v. *Richter*, 54 Mich. App. 598, 221 N.W.2d 429 (1974) (three-week interval between threatening incident and escape); *People* v. *Trujillo*, 586 P.2d 235 (Colo. Ct. App. 1978) (five-month period of threats of homosexual attack lend credence to final threat to "bring back drugs or don't return"); *Esquibel* v. *State*, 576 P.2d at 1132 (threat 24-72 hours before escape).[53] Note, Duress and the Prison Escape: A New Use for An Old Defense, 45 S. Cal. L. Rev. 1062 (1972). Whenever there is any evidence to support the defense it has been left to the jury to decide. *United States* v. *Vigol*, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795); *D'Aquino* v. *United States*, 192 F.2d 338, 357-58 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Hill* v. *State*, 135 Ga. App. 766, 767, 219 S.E.2d 18, 19 (1975); *R.* v. *Gill*, [1963] 1 W.L.R. 841, 845, [1963] 2 All E.R. 688, 690 (Crim. App.) Where a contrary

[53] In *Esquibel*, *supra*, the trial court and the state court of appeals had regarded the defendant's testimony of a long history of serious threats and beatings by guards as insufficient as a matter of law to present a jury issue as to immediate danger of death or serious bodily harm. The state supreme court concluded that "[w]hat constitutes present, immediate and impending compulsion depends on the circumstances of each case," 576 P.2d at 1133, and on the record, "a jury might conclude that the defendant acted under a genuine fear of great bodily harm to himself." 576 P.2d at 1132.

rule has been followed, great injustice has resulted. *State* v. *Green*, 470 S.W.2d 565, 568 (Mo. 1971) (Seiler, J., dissenting), *cert. denied*, 405 U.S. 1073 (1972).

There is a pronounced trend to relax the immediacy requirements under American and English law. This approach evolved out of a recognition that long and wasting pressure may have a greater coercive effect on the will than a threat of immediate destruction.[54]

[54] The comment to the Model Penal Code § 2.09 (Tent. Draft No. 10, 1960), pp. 7-8, states:

> "Beyond this limitation to coercive force or threats against the person, we perceive no valid reason for demanding that the threat be one of death or even of great bodily harm, that the imperiled victim be the actor rather than another, or that the injury portended be immediate in point of time. It is sufficient, in our view that factors such as these be given evidential weight, along with all the other circumstances, in application of the statutory standard. They must be weighed, of course, together with the actor's conduct in succumbing to the pressure they exert, since men of reasonable firmness surely break at different points depending on the stakes that are involved. We think it obvious that even homicide may sometimes be the product of coercion that is truly irresistible, that danger to a loved one may have greater impact on a man of reasonable firmness than a danger to himself, and, finally, that long and wasting pressure may break down resistance more effectively than a threat of immediate destruction. The draft is framed on these assumptions." (Footnotes omitted)

See also, Note, Have The Doors Been Opened?—Duress and Necessity Defense to Prison Escape, 54 Chi-Kent L. Rev. 913, 933 (1978).

In the leading English case of *R.* v. *Hudson & Taylor*, [1971] 2 Q.B. 202, [1971] 2 All E.R. 244, the defendants were prosecuted for perjury after they failed to identify a defendant in a criminal trial contrary to statements previously given to the police. Their defense was duress, based upon the fact that they had been threatened with serious injury if they testified. The court held:

> "In the present case the threats of Farrell were likely to be no less compelling, because their execution could not be effected in the courtroom, if they could be carried out in the streets of Salford that same night. Insofar, therefore, as the recorder ruled as a matter of law that the threats were not sufficiently present and immediate to support the defense of duress we think that he was in error. He should have left the jury to decide whether the threats had overborne the will of the appellants at the time when they gave the false evidence." [1971] 2 Q.B. at 207, [1971] 2 All E.R. at 247.

This approach is particularly appropriate in the context of the prison environment. Note, 54 Chi.-Kent L. Rev., *supra*, at 922-25. The nature of the prison environment mandates that the immediacy requirement to the duress defense be applied flexibly. Unlike other situations in which individuals commit criminal offenses under duress, the prison setting is not one in which an inmate can readily flee from any threatened harm. As the court of appeals noted (Pet. App. 21a n.39), the opportunity to escape is unlikely ever to

coincide or immediately follow a threat or attack. Accordingly, if a prisoner has in fact been threatened by another person or by some prison condition, he knows that the threat could strike again at any time without warning and that he will be helpless. If the coercive threat is from guards, he knows that they have access to him at all hours of the day and night. Even if his assailants are other prisoners, he may have little idea when or where they may strike. See, *e.g.*, *State* v. *Horn*, 58 Haw. 252, 566 P.2d 1378 (1977); *People* v. *Trujillo*, *supra*.

Not only are prisoners physically unable to remove themselves from a threat or force that poses a danger to their safety, they may be in a situation where corrections officials are unable or unwilling to provide them with adequate protection. See, e.g., Note, Duress and the Prison Escape: A New Use for an Old Defense, 45 S. Cal. L. Rev. 1062, 1072 (1972). Furthermore, a prisoner confronted with a serious threat of bodily harm may be in a tragic double bind. If he publicly seeks assistance from corrections officials and accuses another prisoner, or another correctional official, of threatening him, he may face an even more serious threat in the form of retaliation. See D. Cressey, "Adult Felons in Prison," in Prisons in America (L. Ohlin ed. 1973).

Finally, a prisoner may be exposed to long lasting, unrelenting pressure of threatened harm, the impact of which may be as great as a threat of specific, immediate harm.

The Government seems to recognize that the prison environment requires some relaxation of a strict immediate harm requirement (Pet. Br. 42), but it argues that the evidence concerning immediacy was so insubstantial in this case as not to warrant consideration by the jury. This argument cannot be squared with the voluminous testimony concerning conditions and occurrences at the jail, unless substantial portions of the defense evidence is disbelieved and reasonable inferences from that evidence disallowed.

According to that evidence all the respondents were in danger from the fires that were permitted to burn out of control in Northeast One. The jury could have found that fires were set both by inmates and correctional officers (App. 96, 100, 102; Tr. 371, 378, 381); that this was a regular occurrence *on a daily basis between August 1 and August 26* (App. 34, 35, 100; Tr. 150, 152, 377); that the guards let the fires burn (App. 41; Tr. 161-62); and that on at least one occasion a fire was allowed to burn for 24 hours (App. 124; Tr. 415); that there was no ventilation since the windows were closed and the air conditioning system was broken (App. 42, 164; Tr. 163, 547); that the fires were fueled by blankets and sheets or by plastic trash bags (App. 104; Tr. 381); that the smoke from these fires posed a threat to the lives and safety of inmates due to smoke inhalation; and that the corrections officials knew about this situation and did nothing to correct it (App. 56-57, 209; Tr. 206-08, 749). Walker introduced evidence of a history of epileptic seizures and

evidence that he had received inadequate treatment for this condition at the jail.[55]

Finally, there was copious evidence of threats and beatings which extended into August.[56] Bailey testified that numerous threats had been made against him by prison guards concerning his testimony in the *Brad King* case (App. 145; Tr. 473).[57] Garland Hines testified that Bailey had been attacked by guards in the second week in August (App. 110; Tr. 393). Oliver Boling described an attack on Bailey in early August (App. 94; Tr. 368).

Cooley had also been threatened and beaten on several occasions. Garland Hines testified that he saw Captain Dickinson, Officer Webb and some unidentified guards enter Cooley's cell in early August. At

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[55] See pp. 10-20 *supra*.

[56] The inmate witnesses who testified at trial were unable to give exact dates for these incidents. As Wilson said, "My day can't be processed up to the exact date * * *." (App. 46-47; Tr. 170.) Respondent Bailey testified that while at the jail he had no calendar, no date book, and no watch. In response to his trial counsel's question, "[W]ho keeps the days and the times for you, sir?", Bailey said: "Well, I don't worry about them, * * * I have been in jail a little while, you know. I don't keep track of time, you know, like that." (App. 176; Tr. 589.) Most of the witnesses, however, were able to pinpoint late July and the month of August as the time frame within which the beatings and threats occurred (App. 46, 47, 104, 105, 107, 112, 113, 185; Tr. 170, 384, 385, 389, 396-99, 630).

[57] Walker had been brought to the District of Columbia to testify in this same trial.

that time Dickinson threatened to kill Cooley if "another fire's set tonight or any other time" (App. 107; Tr. 389). Cooley was able to place the date of one attack on him as August 9 because he had been in court that day. Officer Brown and six other officers beat Cooley with plastic flashlights and pushed him to his cell (App. 116-17; Tr. 403-04).

This evidence is plainly sufficient to go to the jury on the standard that is apparently acceptable to the Government—"*some* reasonable temporal relationship between the threatened injury and the commission of the illegal act" (Pet. Br. 42)—and on any standard that takes reasonable account of the prison environment. The Government's contention that there was an "undisputed lapse of *several weeks* between the alleged fires, threats, and assaults and respondents' flight" (*id.*) is incorrect. In any event, threats once made have a continuing menance. *Subramanian* v. *Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.) All in all, the Government asks this Court to resolve a factual dispute concerning actual occurrences of controverted events and concerning whether there was a reasonable temporal relationship between the threatened injuries and the flight from jail. Such a determination would invade the province of the jury. The Government offers no good reason why the jury cannot perform its customary function of weighing the evidence in this case.

In neither court below did the Government press or argue at length this issue relating to the adequacy of

the evidence of immediate harm. To the extent that either court below considered the matter, the Government's position was rejected with little comment. This Court is not the proper forum to argue such an issue for the first time.

II

The Crime of Escape Under Federal Law Requires an Intent to Avoid Confinement

A. Introduction

The Government's analysis of the intent issue (Pet. Br. 51 *et seq.*) begins with the observation that at common law only an unauthorized departure from lawful custody had to be shown to establish the crime of escape and proceeds to a discussion of the federal escape statute in which it finds clear evidence that Congress did not intend to depart from the ancient formulation. We believe this analytical approach precisely reverses the proper order of inquiry, this being first to examine the statute and, if it is found not to supply the answer, to turn to common law principles as they have developed over the years. *Morissette* v. *United States*, 342 U.S. 246 (1952); *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). Contrary to the Government's position, an examination of the legislative history provides no support whatever for its claim that Congress "desired to retain the common law formulation of the crime." (Pet. Br. 59.)

Resort to recent common law demonstrates a hostility toward the traditional categories of general and specific intent crimes in favor of a reasoned analysis of the underlying elements of the offense involved. That is what the courts in *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974), and in the *Bailey* decision below have sought to accomplish. Furthermore, several lower courts have found it unnecessary to decide the issue presented by this case because the trial courts instructed the jury that an intent to avoid confinement had to be proved, thus making it the law of the case. Finally, it is significant that even the government recognizes a higher level of intent than was required at ancient common law. This constitutes a recognition by the government that concepts of intent change with the times and actually supports our basic position in this case. The only issue between the parties is what level of intent should be required.

B. The legislative history of the federal escape statute does not demonstrate an intention by Congress to retain the common law formulation of the crime.

The Government's point of departure for its tenuous argument is the unsuccessful attempt in 1928 to enact legislation which would have made it a federal crime for a person convicted of a federal offense and committed to a federal penal or correctional institution, to "break such prison and escape therefrom * * *." 69 Cong. Rec. 1568 (1928). The Government

points out that an amendment by the Senate Judiciary Committee required that the departure be committed "with intent to escape from custody." S. Rep. No. 1505, 70th Cong. 2d Sess. 1 (1929). The bill in this form failed to gain passage by the Senate. 70 Cong. Rec. 2981 (1929).

The second prong of the Government's argument is that new legislation was introduced in the House in the following year, which omitted any mention of the previous year's Senate amendment concerning intent. As the Government concedes, this version was adopted by both houses *without debate* and enacted into law. (Pet. Br. 51.) From this meager history, the Government concludes that Congress was presented with, and chose not to adopt, an "escape statute containing a stricter intent requirement than that imposed by the common law." (Pet. Br. 59.) This analysis is unacceptable. First, the fact that Congress, in considering new legislation in 1930, failed to include a phrase from unsuccessful legislation in 1928 is devoid of any inferential value. There is no evidence that Congress gave consideration to prior bills. Secondly, the phrase in issue, "with intent to escape from custody", says nothing whatever about the level of intent required. Nor does it convey the same meaning as "escape with intent to avoid confinement". There is certainly no evidence that the 1928 version failed to win passage because of this language and less still that Congress was concerned with the issue of intent when it enacted

legislation in 1930.[58] It is clear, as the Government itself observes (Pet. Br. 59), that Congress enacted legislation "without addressing the mental element required." Any further attempt to deduce Congress's intention is sheer conjecture.

Available history concerning the enactment of the 1930 statute is similarly unilluminating. The bill which contained the escape provision was part of a program sponsored by the Attorney General for the reorganization and improved administration of the federal penal system. H.R. Rep. No. 106, 71st Cong. 2d Sess. (1930); S. Rep. No. 533, 71st Cong. 2d Sess. (1930).[59] Prior to the enactment of the Federal Escape

[58] In 1930, the number of federal prisoners had grown to 20,000 annually. The purpose of the bill was to establish a Bureau of Prisons to supervise the care and supervision of federal prisoners. The prevalent practice in those days, as described in a letter from the Attorney General, was to house federal prisoners in local jails and workhouses, many of which had become so overcrowded that local authorities refused to accept federal prisoners. In many cases, the Attorney General reported, it would be more economical for the Government to build its own facilities "rather than pay the unreasonable prices paid to local governments for a very low standard of care and subsistence." The prospect of providing federal correctional facilities demanded that provision be made against escape. H.R. Rep. No. 106, 71st Cong. 2d Sess. 2-3 (1930).

[59] The original version, set forth in the Government's brief (Pet. Br. 50-51), applies only to prison "break" which at common law required force. 69 Cong. Rec. 1568 (1928). Congress may have regarded this as too narrow. The 1930 statute applied to "escapes and attempted escapes".

statute on May 14, 1930 (c. 274, § 9, 46 Stat. 327), there was no federal statute prescribing as crimes prison breach or escape by prisoners from custody, although these were crimes under common law.[60] As described by the Attorney General:

> "There is now no statutory penalty for escaping from the custody of a Federal prison or Federal officers. An escape bill passed the House during the last session but was not approved by the Senate. The provisions of this escape bill have been incorporated in sections 9 and 10 of the proposed legislation to eliminate the necessity to introducing a separate bill on the subject. A similar provision is also found in the bill which established two United States narcotics farms."

H.R. Rep. No. 106, 71st Cong. 2d Sess. 3 (1930); S. Rep. No. 533, 71st Cong. 2d Sess. 3 (1930). This is the sum and substance of the legislative history. It is totally devoid of any discussion regarding intent.

C. An intent to avoid confinement is an appropriate requirement of common law principles in prison escape

It is axiomatic that the mere omission from a federal statute of any mention of intent will not be construed as eliminating that element from the crime in question. *Morissette* v. *United States*, 342 U.S. at

[60] See the summary of prior statutes on escape at p. 84 n. 44 *supra*.

250, 262; *cf. Lambert* v. *California*, 355 U.S. 225 (1957). As the Court said in *Morissette*.

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motive for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' " 342 U.S. at 250-51 (footnotes omitted).

Of course, the issue here is not whether any intent is required because both parties agree that a *mens rea* is an indispensable element of the offense. Rather, the question is what *degree* of guilty mind is required. The Government takes inconsistent positions on this critical question. On the one hand, it urges the Court to apply the level of intent prescribed at common law for escape cases: unauthorized departure from lawful custody. (Pet. Br. 47-50.) In the margin, the Government quotes, with apparent approval, the trial court's instruction in this case which defined the requisite

intent in part as a "thing * * * done consciously and voluntarily and not inadvertently or accidentally." (Pet. Br. 53-54 n. 37.) On the other hand, the Government contends that "intent" is used in criminal statutes in three senses:

> "(1) that the defendant performed the prohibited act deliberately, not accidentally or unconsciously; (2) that the defendant knew the act was wrongful; or (3) that the defendant did the act to further some ultimate goal." (Pet. Br. 52-53.)

Here, the Government asserts that it is the second category of intent that is germane to escape cases, apparently overlooking the fact that the jury was instructed in terms of the first type. If wrongful knowledge must be proven to establish the offense, then the jury was improperly instructed and this would constitute an independent basis for reversal. At the very least, this is a recognition by the Government that the common law undergoes modifications and what was acceptable in the Fourteenth Century does not necessarily apply in modern times.

Escape at common law holds little meaning for today because conditions are different. The common law recognized three broad classifications of prison escape under the rubric of "Offenses Against Public Justice": prison breach, escape, and rescue. See generally 2 Bishop's New Criminal Law 621-639 (8th ed. 1892). Prison breach was the breaking out (by force) of prison

by one confined therein.[61] "Escape" had two separate meanings. One imposed liability on the jailer for voluntarily or negligently allowing a prisoner in lawful custody to leave his confinement. The other punished prisoners who left confinement without the use of force. The former was considered the more serious.[62] Leaving confinement without the use of force was punished as a misdemeanor only. 2 Bishop's New

[61] Breach of prison was regarded as a felony regardless of whether the escaped prisoner was being held for a misdemeanor or a felony. The severity of this rule was ameliorated in 1295, with the passage of the statute *De frangentibus prisonam*, 23 Edw. I (sometimes described as I Edw. 2 stat. 2. See J. Turner, Russell on Crimes 350 n.4 (10th ed. 1950)). Thereafter, whether prison breach was punishable as a felony or a mis lemeanor depended upon the offense for which the defendant had been held. This concept is carried forward in Section 751 (a). Prison breach was a clergyable offense. 1 M. Hale, Pleas of the Crown *612; Russell on Crimes, *supra*, at 354.

[62] 4 W. Blackstone, Commentaries *130. Negligent escape was punishable by fine, but if the officer permitted the prisoner to leave voluntarily, he was liable to be punished to the same extent as the prisoner held in custody, whether it be treason, felony or trespass. *Id.* This rule was ameliorated by requiring that the prisoner himself had to be found guilty of the offense before the jailer could be punished. According to one authority, the evidence does not show that these penalties were actually imposed. R.B. Pugh, Imprisonment in Medieval England 234 (1968).

It was common practice for gaolers to let debtors out on "furloughs" from which they sometimes failed to return. In these circumstances the gaoler was liable to the escaped prisoner's creditor and the Law Reports are filled with debt actions against

Criminal Law at 637. There is some evidence that even this penalty was not enforced.[63]

The third offense was rescue, which came about when someone else broke into the prison and freed the

sheriffs and other custodians. See, *e.g.*, *Raverscroft* v. *Eyles*, 2 Wils. K.B. 294, 95 Eng. Rep. 819 (1766); *Bonafous* v. *Walker*, 2 T.R. 127, 100 Eng. Rep. 69 (1787). When a gaoler permitted a prisoner to voluntarily escape, it resulted in the prisoner's discharge and he could not be retaken by the sheriff. *Atkinson* v. *Jameson*, 5 T.R. 25, 101 Eng. Rep. 14 (1792). Thus, in *Sheriff of Essex's Case*, Hob. 203, 80 Eng. Rep. 349 (1618), the prisoner had willingly been let go by the gaoler and had returned. When a new sheriff took office, the prisoner escaped. An action was brought by the creditor against the new sheriff. The court held that the new sheriff was not answerable and stated that when the sheriff let him go abroad voluntarily "the execution was utterly discharged, so as he could not lawfully be taken again, nor judged in execution by law, though the party would yield himself unto it, or the creditor so allowed him."

[63] "In order to incur the pains of 'escaping' it was necessary according to the view that eventually prevailed, for the prisoner to have 'broken' prison, an act which is once or twice called 'burglary.' If the door stood open through the negligence of the gaoler or was forced open by the activities of other prisoners or a mob without, the prisoner was himself exonerated. He had 'gone out', not 'broken out', and any culpability was transferred from him to rescuers or keepers. This seems to have been on the way to settlement in Edward IV's time. At all events a Star Chamber action of 1482 turned on the question whether an escaper had 'broken out of ward' or whether he had 'come out'. With the rescuers themselves the law dealt severely. Coke, quoting Billing and Choke, justices at the time when the foregoing distinction between 'breaking out' and 'going out' was established, declared that rescuing was always felony at common law,

prisoners. This was regarded as a serious offense, and the rescuer was punishable depending upon the offense for which the freed prisoner was held. If the person rescued was not in privity with the rescuers, he was not liable for prison breach but only for escape. This congeries of rules, developed in medieval times to deal with specific problems, cannot dictate what the elements of escape should be today.[64]

No concept has been more difficult of application than the distinction between specific and general intent in the criminal law. The decision in *Bailey* is an effort to avoid labels and identify the real elements that underlie any prosecution for prison escape. The Government repeatedly departs from analysis and resurrects the terms "general" and "specific" intent in its discussion of the issues. As pointed out by the court of appeals, the word "escape" is not self-defining, and greater clarity can be achieved by abandoning the labels of specific and general intent entirely. W. LaFave & A. Scott, Criminal Law 202 (1972).

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and reported cases confirm that opinion, though not quite unequivocally." R.B. Pugh, Imprisonment in Medieval England 230-31 (1968) (footnotes omitted).

[64] In fact, application of the common law would have meant that the charge against Bailey, Cooley and Cogdell should be reduced to a misdemeanor or perhaps dropped. Bailey's cell door, for example, was opened by guards and he left, as apparently did the others, through an open window in Walker's cell, employing no force. (App. 178-79; Tr. 592-95.) At common law, they would have been charged with escape and not prison breach.

In *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974), the court sought to unravel the confusion that was created when labels such as specific and general intent were used to describe the mental element of the crime. Central to the court's reasoning was the difficulty of distinguishing between escape, which has traditionally been viewed as requiring a "general" intent, and attempted escape, which has been regarded as a "specific" intent crime. The court could perceive no reliable guide for distinguishing the offenses and illustrated its point by making reference to the facts of a case heard by a different panel of the court the day after Nix's appeal was argued. Nix had been drinking heavily and turned up missing from his cell. He was found 45 minutes later locked in the rear of a trailer truck parked outside the prison walls. He was indicted for attempted escape.

The defendant in the other case, one Peterson, had also been drinking heavily and left an honor camp. He was apprehended the next morning eight miles from the camp. He testified that he was trying to get back to the camp and still had a towel and some toiletries in his possession from the night before. He was charged with escape. As the court said:

> "The trouble with this approach is the impossibility of drawing a line between escape and attempted escape. Was the difference between Nix' act and Peterson's the eight miles Peterson traveled? Or an overnight absence versus the hours Nix was missing? Any escapee brought to trial was ultimately unsuccessful." 501 F.2d at 518.

The court found that a mechanical application of labels attaches too great importance to the prosecutor's choice in charging a defendant and "interferes with the crucial analysis a court should make in escape cases: what constitutes the 'escape' element of the crime?" 501 F.2d at 518.

The court concluded that most cases had held that a crucial element of the offense was the intent to avoid confinement.[65] It identified two cases for the necessity

[65] 501 F.2d at 519. For example, although decided after *Nix*, Florida appellate courts have rejected the application of the common law standard and found that, where prisoners escape to avoid intolerable prison conditions, the requisite intent is lacking. In *Bavero* v. *State*, 347 So. 2d 781 (Fla. Dist. Ct. App. 1977), a conviction for escape was reversed because the trial court had excluded evidence that the defendant escaped due to official indifference to a severe asthmatic condition that threatened his life. The court reaffirmed its earlier holding in *Helton* v. *State*, 311 So. 2d 381 (Fla. Dist. Ct. App. 1975) that "there are two elements to the crime of escape: the physical act of leaving, or not being in, custody coupled with the intent to avoid lawful confinement," 347 So. 2d at 783, and observed that Bavero denied a wilful intent to escape. *Id.* at 784. And in *Lewis* v. *State*, 318 So. 2d 529 (Fla. Dist. Ct. App. 1975), *cert. denied*, 334 So. 2d 608 (Fla. 1976), it was held that the lower court had erroneously excluded evidence that the reason the defendant escaped was to obtain protection from sexual assault and not to avoid confinement. In both cases the evidence of the rationale for departure was deemed relevant to the requisite intent.

of showing intent to avoid confinement in escape prosecutions:

> "The first is 'the desire to have one human element of "blameworthiness" as a basis for punishment.' The other reason is the knowledge that a prisoner who has no intent to escape—because he is grossly intoxicated, or thinks his jailer has told him to leave, or mistakes the boundaries of his confinement, or has a gun held to his head by another inmate—is not likely to endanger society as a wilful escapee is." 501 F.2d at 519.

These rationales are valid when applied to escapes from intolerable conditions. "The threatened prisoner, like the intoxicated or mistaken prisoner, does not escape because he would rather be free than incarcerated. * * * He escapes primarily to be free from the intolerable conditions that pose dangers to his personal security. Such action is difficult to characterize as 'blameworthy.' " Comment, 127 U. Pa. L. Rev., *supra* at 1159. As Blackstone recognized, such external conditions can overcome free will and force a person to leave not to gain his freedom but to avoid the threat. 4 W. Blackstone, Commentaries *27, *30. A jury might excuse such behavior when viewed in light of the conditions that motivated him to flee.

The second principle is also applicable. One who escapes to avoid death or serious bodily injury is not as likely to pose a danger either to prison personnel or to society as is one who flees for the purpose of regaining his freedom. If force is used, of course, the

individual may be punished for a separate offense. See, e.g., 18 U.S.C. §§ 111, 1114.[66]

The Government apparently accepts the notion that an individual who escapes from custody either by reason of intoxication or mistake lacks the requisite intent. Therefore, whatever society's interest in preventing escapes, it is not solely to ensure that a person convicted of a crime serves out his sentence without interruption. The requirement that the prisoner possess the intent to avoid confinement is responsive to the underlying notion that, as in the case of mistake and intoxication, additional punishment should not be imposed if the prisoner did not leave in order to regain his freedom.

Rex v. *Steane*, [1947] K.B. 997, [1947] 1 All E.R. 813, underscores the relevant principle. The defendant

[66] 18 U.S.C. § 111 provides:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C. § 1114, which makes it a federal offense to kill officers and employees of the United States specifically includes "any officer or employee of any United States penal or correctional institution."

was charged with a statutory offense of doing an "act likely to assist the enemy with intent to assist the enemy." The accused had taken part in enemy broadcasts. He alleged that he had done so in consequence of violence towards himself and of threats to himself and his family, all of whom had been in Germany. The court (Lord Goddard, C.J.) held that the jurors should have been instructed that they could infer the necessary intent from the defendant's acts only if they were convinced that the defendant had freely chosen to broadcast for the purpose of aiding the enemy rather than with the "innocent" intent to protect his family from harm. [1947] K.B. at 1006.[67] By the same token, the jury in this case could find that the respondents left the prison solely to protect their lives and not to regain their freedom.

The cases cited by the Government for the proposition that the lower federal courts have consistently

[67] The court stated:

"The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free uncontrolled action of the accused, they would not be entitled to presume it, if the circumstances showed that the act was done in subjection to the power of the enemy or was as consistent with an innocent intent as with a criminal intent, for example, the innocent intent of a desire to save his wife and children from a concentration camp." [1947] K.B. at 1006, [1947] 1 All E.R. at 817.

construed § 751(a) as requiring only a "general" intent are virtually all distinguishable. In *United States* v. *Woodring*, 464 F.2d 1248, 1251 (10th Cir. 1972), and *United States* v. *Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976), the trial courts actually instructed the jury that it must find an intent to avoid confinement to convict. *Cf. United States* v. *Snow*, 157 U.S. App. D.C. 311, 484 F.2d 811 (1973).

The Government is in error when it argues that the Court of Appeals, by confusing coercion with lack of intent, thereby eliminated the need for a defendant charged with escape to demonstrate imminent threat to his life or health, absence of legitimate alternatives, and the cessation of his unlawful activity at the earliest possible moment through surrender to appropriate authorities (Pet. Br. 67). As the court explained, at trial the prosecution can establish a *prima facie* case by showing an unauthorized departure. The burden then shifts to the defedant to adduce evidence that he left solely to avoid life-threatening conditions of confinement and not confinement itself. The prosecution then has the opportunity to rebut the defendant's evidence. The immediacy of the harm, available alternatives, and failure to return are all relevant factors that may be taken into account in determining whether the defendant's sole reason for leaving was to avoid serious bodily harm or death.

Furthermore, the court's opinion is not totally devoid of standards for determining what conditions would constitute abnormal conditions of confinement.

The examples given by the court are lack of *essential* medical treatment, homosexual attack, or beatings in reprisal for testimony in a trial. The court made clear that it did not have in mind an unpalatable dinner menu. The court's opinion does not invite "introduction of evidence of every conceivable unpleasantry that may exist within the prison." (Pet. Br. 68.) The condition must threaten the life or health of the prisoner.[68]

Ultimately, the question of which standard of intent is required turns on the social utility of the competing definitions of escape. Comment, U. Pa. L. Rev., *supra* at 1166. The Government has argued that adoption of the majority's test will encourage escapes due

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[68] The Government is concerned that the "specific intent" requirement will "allow juries an essentially unfettered discretion to decide what confinement conditions are sufficiently adequate to warrant escape." (Pet. Br. 69–70.) This is flatly inconsistent with its position that the choice-of-evils defense—based on the same facts—is available in the escape context if the person turns himself in immediately. In raising the specter of juries dictating to prison administrators appropriate conditions of confinement, the Government misconstrues the respondents' claim. The cases in this area invariably concern homosexual rapes, threats and beatings by guards, and lack of essential medical treatment, not generalized complaints about prison conditions. The Government's apprehension that prison policy will be dictated by juries is unfounded. *Bell* v. *Wolfish*, 60 L. Ed. 2d 447 (May 14, 1979) cited by the Government, concerns the constitutionality of certain conditions of pretrial detention and is not germane to this case.

to its high potential for abuse. But this argument would carry more force if the Government were taking the position that escape is never justified (see Pet. Br. pt. I). Even though the Court of Appeals refused to adopt inflexible criteria, it is apparent that the escapee's "failure or tardiness to return is one of the most significant considerations for the jury" and is "an extremely important consideration in determining the defendant's intent." Comment, 127 U. Pa. L. Rev., *supra*, at 1169.

> "The fact that the jury will be required to evaluate a defendant's intent under the *Bailey* rule provides a sufficient safeguard against the possibility of a multitude of phony 'involuntary' escapes from intolerable prison conditions. A defendant must raise the issue of his voluntariness, 'by competent evidence in a trial where the testing of witnesses is subjected to the scrutiny of the factfinder who, in the course of determining the true facts of the case, would properly consider the credibility of the various witnesses.' * * * An escapee who does not immediately turn himself in is not thereby precluded from reaching the jury. Practically, however, he must still be able to convince the jury that he had a justifiable reason for waiting. It is the exclusive role of the jury as the representative of the community to judge the credibility of a defendant's story. '[T]he framework of the fact-finding process' is the traditional means of ascertaining the truth of other defendants' tales; it should remain as the means of determining the basis of escapees' tales." Comment, 127 U. Pa. L. Rev., *supra* at 1169-1170 (footnotes and citations omitted).

Where a prisoner does immediately return and is indicted for escape, even under the Government's theory he is entitled to introduce evidence showing the circumstances of the alleged duress that caused him to leave.[69] There is no reason to believe that the jury will be diverted from the essential facts in either situation.[70]

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[69] Even the Government concedes that, where a prisoner escapes and promptly turns himself in to the authorities, he is entitled to have the jury consider evidence (including his own testimony) that he acted under duress or that he lacked the requisite *mens rea* to convict him for his initial departure from custody. There is no reason to believe that juries will be any less critical or less competent in evaluating evidence on these same points where the prisoner does not turn himself in immediately.

[70] "But the criminal justice system's reliance on the role of the jury does not fluctuate with the relative ease of the particular fact-finding mission, and the possibility for error is present in all trials. If the defendant truly departed solely to avoid intolerable prison conditions of a serious nature, the jury's refusal to bring in a verdict of guilty would not in any way contribute to a rash of 'unverifiable' escapes. If the prisoner escaped to avoid confinement conditions, the "traditional safeguards for determining the truth of a tale" should be sufficient to preclude him from taking advantage of the *Bailey* option. Juries should not be assumed to be less competent to assess intent to escape than they are to determine intent in other contexts. Moreover, the return requirement operates as a continual check upon the possibilities for abuse of the *Bailey* alternatives. Escape remains a continuing offense, and the consideration of return remains a highly pertinent factor. The longer the escapee stays away from custody the more difficult will be his task of

The Government's contention that "the increased number of escapes will mean an increased level of tension within the prison system, an increased disruption of prisoner discipline, and an increased danger of injury to correctional personnel and the public" (Pet. Br. 69) is a false syllogism. And its conclusion—*i.e.*, that there will be increased numbers of escapes—is not supported by any empirical evidence. (See p. 69 n. 35 *supra*.)

In the final analysis, the Government is afraid that jurors will be taken in by clever defendants. An appropriate rebuttal to "those who are forever apprehensive of the gullibility of juries is found in the English case of *Thomas* v. *R.*, [1937] 59 C.L.R. 279, 309:

> "* * * a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code." Quoted in *Abbott* v. *The Queen*, [1976] 3 W.L.R. 462, 475, [1976] 3 All E.R. 140, 152 (P.C.) (Wilberforce and Edmund-Davies, JJ., dissent).

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persuading the jury that his continued freedom was justifiable. The necessity of return is a constant factor which reflects society's interests." Comment, 127 U. Pa. L. Rev., *supra* at 1170-1171 (footnotes omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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